(22,531.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 910.

THOMAS H. PICKFORD AND JOHN H. WALTER, APPELLANTS,

vs.

HENRY M. TALBOTT.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.

	Page
Caption	1
Transcript from the supreme court of the District of Columbia	1
Caption	1
Bill of complaint	1
Complainants' Exhibit No. 2—Affidavit of Judge J. B. Henderson	12
Restraining order	13
Marshal's return	14
Answer of Henry F. Woodard	14
Demurrer of Andrew A. Lipscomb	15
Affidavit of Andrew A. Lipscomb	15
Answer of Henry M. Talbott	15
Answer of Aulick Palmer, United States marshal	20
Motion to dissolve restraining order	21
Affidavits	21

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	Page
Amendments to bill	27
Complainants' Exhibit No. 3—Affidavit of G. C. Shaw	31
Answer of Henry M. Talbott to amended bill	33
Opinion	34
Order continuing restraining order *pendente lite*	38
Disclaimer of Thomas M. Talbott	38
Answer of Andrew A. Lipscomb	39
Testimony for complainants	40
Exhibit A—Petition for writ of *habeas corpus*	41
Writ of *habeas corpus*	42
Marshal's return	43
Recognizance for appearance of petitioner	43
Amendment to original petition	44
Return of respondent	45
Copy of writ of *habeas corpus*	46
Order to surrender the prisoner	
Decree discharging petitioner	
Certificate of John R. Young, clerk S. C. D. C.	
"Exhibit B"—Opinion of Justice Bradley	
Indictment	
C—Extract from deposition of Mr. Talbott in law c No. 45662	
D—Extracts from deposition of Talbott in police court	60
Testimony of Samuel Maddox	61
Indictment presented by grand jurors of the State of Maryland	66
Bench warrant	67
Certificate of John L. Brunett, clerk of circuit court, Montgomery county, Maryland	70
Docket entries	71
Testimony of Alexander Kilgour	72
Testimony of James B. Henderson	93
Depositions on behalf of defendants	100
Deposition of Henry Maurice Talbott	101
Henry Maurice Talbott (recalled)	101
James Hudson	103
Andrew A. Lipscomb	104
Testimony in rebuttal	120
Testimony of Thomas H. Pickford	120
Charles R. Newman	125
Thomas H. Pickford (recalled)	128
Depositions in sur-rebuttal	133
Deposition of Henry Maurice Talbott	133
James Hudson	138
Bernard A. Duke	139
Henry Maurice Talbott (recalled)	145
Deposition of F. Edward Mitchell, intervenor	146
Additional cross-examination of Bernard A. Duke	150
Opinion by Justice Barnard	152
Final decree granting perpetual injunction	154
Appeal to Court of Appeals taken by Henry M. Talbott	155
Order of severance	155
Directions to clerk for preparation of transcript of record	155

Page

Memorandum : Appeal bond filed 156
Clerk's certificate 156
Minute entries of argument 157
Opinion 157
Decree 165
Order allowing appeal 165
Bond on appeal 165
Citation and service 166
Clerk's certificate 167

In the Court of Appeals of the District of Columbia.

No. 2152.

HENRY M. TALBOTT, Appellant,
vs.
THOMAS H. PICKFORD et al.

a Supreme Court of the District of Columbia.

Equity. No. 28244.

THOMAS H. PICKFORD and JOHN H. WALTER, Complainants,
against
HENRY M. TALBOTT, THOMAS M. TALBOTT, AULICK PALMER, ANDREW A. LIPSCOMB, and HENRY F. WOODARD, Defendants.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Bill.*

Filed January 8, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28244.

THOMAS H. PICKFORD and JOHN H. WALTER, Complainants,
against
HENRY M. TALBOTT, THOMAS M. TALBOTT, AULICK PALMER, ANDREW A. LIPSCOMB, and HENRY F. WOODARD, Defendants.

The complainants state as follows:

1. They are citizens of the United States and residents of the District of Columbia, and bring this suit in their own right.

2. The defendants are citizens of the United States and residents, respectively, as follows: The defendants, Talbott, of the County of

Montgomery, State of Maryland, and the defendants, Palmer, Lipscomb and Woodard, of the District of Columbia. The defendants, Henry M. Talbott and Andrew A. Lipscomb, are sued in their own right. The defendant, Palmer, is sued as Marshal of the United States of America in and for the District of Columbia. And the defendants, Thomas M. Talbott and Woodard, are sued as the pretended assignees of certain interests in the certain judgment hereinafter mentioned and described.

3. In, to-wit, the month of May, 1897, the complainants
2 purchased, and became the owners of, certain land and premises situate at or near the certain place in the County of Montgomery, State of Maryland, known as Four Corners, together with the improvements thereon, consisting of a spacious mansion-house and other buildings, which said mansion-house and buildings, at the time, were insured by sundry fire insurance companies in the sum of, to-wit, Thirty-five thousand dollars ($35,000). Shortly after the purchase of the said premises by the complainants, the insurance upon the said improvements thereon was, by the complainants, of their own motion, procured to be reduced, and the same was reduced, to the sum of Twenty-seven thousand, five hundred dollars ($27,500), at which figure the same thenceforth remained. Subsequently, the complainants decided and entered upon the making of certain alterations and repairs to the said improvements, at the estimated and expected cost of, to-wit, three thousand dollars ($3,000), and had actually expended in and about the same the sum of, to-wit, two thousand dollars ($2,000), when, on, to-wit, the thirteenth day of September, 1897, the said improvements were accidentally destroyed by fire. Thereupon the complainants demanded of the said insurance companies the payment of the last mentioned sum of Twenty-seven thousand, five hundred dollars ($27,500), but the said companies declined to pay the same, upon the ground, among others, that the making of the said alterations and repairs had been entered upon without due authority or permission from the said companies, or some of them, and the
3 complainants were required to enter, and did enter, suit against the said companies for the said insurance, in, to-wit, the month of February, 1898, whereupon such proceedings were had as that the said companies paid to the said complainants, in all, for and on account of the said insurance, the sum of Twenty-two thousand, five hundred dollars ($22,500), and the suits against the said companies were thereupon discontinued and dismissed by the complainants.

4. At all the times hereinbefore stated, one Alexander Kilgour was State's Attorney of the said State of Maryland in and for the County of Montgomery aforesaid, and continued so to be down to, and until, the month of January, 1900, when the defendant, Henry M. Talbott, became such State's Attorney, and the said Talbott continued to be such thenceforward for a period of, to-wit, four years.

5. While the said Kilgour was State's Attorney, as aforesaid, complaint was made to him as such, in behalf of the insurance companies aforesaid, or some of them, with a view to having the complain-

ants indicted for the unlawful burning of the improvements aforesaid, but the said Kilgour declined to lay the matter before the Grand Jury of said County of Montgomery, and dismissed the same from consideration.

6. Thereafter, and in, to-wit, the month of March, 1901, a time, to-wit, three years and six months after the said burning of the improvements aforesaid, and, to-wit, fourteen months after the defendant, Henry M. Talbott, had so as aforesaid become State's Attorney, and while he was such State's Attorney, as aforesaid, the said
4 defendant, upon the sole testimony of one Hudson, who was, at the time, an entire stranger to the said defendant, procured the complainants and one Shaw and one Bradshaw to be indicted by the Grand Jury in and for the said County of Montgomery upon a charge of having supposedly unlawfully and criminally burned, or procured to be burned, the improvements aforesaid at the time of their burning aforesaid, and process upon the said indictment against the defendants in the same was procured by the said defendant, Talbott, to be issued, and was issued, authorizing and directing the arrest of the complainants and their co-defendants in the said indictment for trial upon the same at the town of Rockville, the County Seat of the said County of Montgomery.

7. Immediately upon learning of the said indictment, the complainant, Pickford, went to the said town of Rockville, appeared to the said indictment, and gave bail to answer the same, but the complainant, Walter, and the said Shaw and the said Bradshaw, all of whom, at the time, were residents of the District of Columbia, awaited, at the said District, service upon them of process on the said indictment, and the same was served upon them, and each of them, at the said District, and they were apprehended thereunder and sought to be delivered into the custody of the said State of Maryland for trial upon the said indictment; whereupon, the said complainant, Walter, the said Shaw and the said Bradshaw sued out their several writs of *habeas corpus* in the said District, and, upon and under the same, were brought for hearing before the Honor-
5 able Andrew C. Bradley, a Justice of the Supreme Court of the District of Columbia, who, after hearing the same, held and decided that the said indictment, while charging the said Walter, Shaw and Bradshaw with having burned, or caused to be burned, the improvements as aforesaid, did not so charge them as to make or constitute the said burning, as in and by the said indictment described, an offense in law; wherefore the said Walter, Shaw and Bradshaw were discharged of and from custody under the process aforesaid, and released accordingly of and from the force and effect of the said indictment so far as their delivery under the same in the District of Columbia for trial thereunder in the said State of Maryland was concerned.

8. Thereafter, and in, to-wit, the month of November, 1901, on the day set for his trial on the said indictment, the complainant Pickford attended for that purpose before the Circuit Court for said Montgomery County, at the said town of Rockville, with witnesses to support his defense against the said indictment; whereupon the

defendant, Henry M. Talbott, announced that he was not ready to go to trial and prayed the said Circuit Court for a postponement or continuance of the said trial; whereupon the said Court decided and declared that it would grant such postponement or continuance upon condition that, if the said defendant, Talbott, should not be ready on the day set, he would confess that the said Pickford was not guilty, to which condition the said defendant declined to consent, and one of the Judges of the said Circuit Court then and there pronounced and declared as follows:

6 "Ordinarily persons charged with crimes do not seek for trial. Here we have a man who could not be compelled to answer at the bar for the crime with which he is charged, who voluntarily comes forward and asks for a trial. For that purpose he is now in court with his witnesses. The indictment of an innocent person is a serious matter to keep hanging over his head";

and thereupon the said defendant, Talbott, nolle prossed the case of the said indictment, and the same was abandoned.

9. Thereafter, on, to-wit, the 8th day of December, 1901, there appeared in a certain newspaper known as the Sunday Globe, published and circulated in the District of Columbia, a certain article entitled "History of a Crime", a true copy of which is set out in the certain paper, herewith filed as a part hereof, and designated as "Complainants' Exhibit No. 1." And afterwards, and on the 27th day of September, 1902, the defendant, Henry M. Talbott, brought suit against the complainants in the Supreme Court of the District of Columbia, in cause numbered 45,662 at Law, on the dockets of the said Court, charging the complainants with the composition and publication of the said article, and praying judgment for damages against the complainants in the sum of Twenty-five thousand dollars, besides costs, as for libel of the said defendant in, by and through the said article: a true copy of the declaration in which said cause, embodying and containing a copy of the said article, is, together with the same, hereto annexed and filed herewith, the same being marked "Complainants' Exhibit No. 1", and being prayed to be taken as part of this paragraph and bill of complaint as though the same were herein fully and at large set forth. The said cause numbered 45,662 At Law came on for trial, and

7 was tried, in the Supreme Court of the District of Columbia by a Justice of the said Court and a jury, in the month of March, 1906.

10. As in and by the said declaration therein appears, the gravamen of the complaint in the said cause numbered 45,662 At Law was, and is, that the complainants herein, by the composition and publication of the article and alleged libel aforesaid, had charged the defendant, Henry M. Talbott, in effect, with abuse of his official position and prostitution of his said office, for the purpose and in the hope, through the criminal proceedings aforesaid instituted by him against the complainants, of obtaining from the insurance companies aforesaid large sums of money, and, in effect, using his said office for his personal end and gain in manner aforesaid. At the time of the filing of the said declaration, the complainants verily

believed it to be true that the said defendant Talbott had, in fact, caused the said indictment to be procured against them, the complainants, in the hope and with the purpose aforesaid, and so informed their counsel in the said cause before the filing of their pleas to the said declaration therein, but the complainants were advised by their said counsel that, should they, the complainants, attempt, in and by their said pleas, to justify the publication of the said article by pleading the truth thereof, and yet fail to make good such plea by evidence to the satisfaction of the court and jury to try the said cause, the said attempt at justification would be held to be a repetition and republication of the said libel, and would,
8 accordingly, aggravate the damages possibly to be recovered in the said cause; and the complainants were, on the other hand, advised by their said counsel that, if they, the complainants, should plead not guilty generally to the said declaration, they would, in all probability, be excluded from endeavoring to prove the truth of the said article and alleged libel to the effect aforesaid; and the complainants, principally because of the secret nature of the supposed and believed conduct of the said defendant in the premises, being unable, after due diligence in that behalf, to procure and submit to their said counsel, evidence which, in the opinion of counsel, might properly and safely be offered before the court and jury on the trial of the said cause at law, in justification of the said article and alleged libel and in proof of the truth thereof, were compelled to confine, and confined, their defense in the said cause to the general issue, and were thereby deprived of the right and opportunity to offer evidence tending to prove the truth aforesaid; and, although their counsel did in fact offer, on the said trial, evidence tending to impugn the good faith of the said defendant in procuring the indictment aforesaid, the justice trying the said cause declared and held that such offer was an attempt on the part of the said complainants and their counsel to prove the truth of the said article and alleged libel, without having pleaded the same; wherefore the offer of the said testimony was, by the court, rejected, and the complainants were denied the right and privilege to produce before the court and jury the testimony aforesaid, and
9 any and all testimony having for its object or effect the proof of the truth of the said alleged libelous statement that the said defendant had in fact so used, abused and prostituted his office as aforesaid.

11. At the said trial of the said cause numbered 45,662 At Law, however, under the ruling of the Justice presiding that the same might be shown, not in justification of the said alleged libel or to prove the truth thereof, but to indicate the absence of malice on the part of the complainants and to mitigate the damages possibly to be recovered in the said cause, the complainants offered and gave in evidence the following matters and things, all of which were shown to have been known by and to the complainants at and before the composition and publication of the said alleged libel, namely: All the matters and things hereinbefore in the fourth,

fifth, sixth, seventh and eighth paragraphs of this bill set forth and alleged, and the following facts and circumstances:

At the time of the burning of the improvements aforesaid, to-wit, in the month of September, 1897, the complainant Pickford was extensively engaged in the grocery business at the corner of Ninth street and Louisiana Avenue, Northwest, in the City of Washington, District of Columbia. In November, 1900, the said complainant made the acquaintance of one Hopp, a resident of the said District, who became, and was, a customer of the said complainant at his said place of business and had a small line of credit thereat. To-wit, three weeks, after the said complainant became acquainted with the said Hopp, he, the said Hopp, came to
10 the said complainant and asked if he, the said complainant, was "in trouble about a fire in Maryland," to which said complainant replied that he had had some trouble with insurance companies but that the matter had been settled out of court; whereupon the said Hopp stated that the said Hudson, aforesaid, and the Prosecuting Attorney of Montgomery County, Maryland, meaning the defendant, Henry M. Talbott, were trying to get evidence tending to show that the complainants were guilty of causing, or procuring, the destruction by fire of the improvements aforesaid, and he, the said Hopp, further said to the said complainant "for a small matter of five hundred dollars I can fix it for you"; and to this the said complainant replied that he would not be blackmailed. Subsequently, and, to-wit, about the first day of February, 1901, the said Hopp came to the place of business of the said complainant and showed him, the said complainant, a cheque from the said defendant, Talbott, or the firm of which he was a member, for the sum of seventy-five dollars ($75), which the said Hopp then and there stated that he had received from the said Hudson and that the same had been sent to the said Hudson as part of the money which the said defendant, Talbott, was willing to pay to get evidence to convict the said complainant, Pickford, under the indictment then pending at the town of Rockville, as aforesaid; whereupon, the said complainant, Pickford, stopped the credit of the said Hopp at his, the said complainant's, place of business, and had nothing further to do with him, the said Hopp. In the following month, to-wit, in the month of March, 1901, the complainants were indicted, as aforesaid, and there followed upon the indictment of the
11 said complainants the acts and proceedings hereinbefore set forth. Upon the return of the complainant, Pickford, from the said town of Rockville, where, as aforesaid, he had gone to answer to the said indictment, and, on the afternoon of the same day, the said complainant was informed by one of his clerks that the said Hopp had called at the said complainant's place of business wanting to see him, the complainant. Subsequently, the said complainant met the said Hopp, who told the said complainant "that the matter could be settled yet, but it would take a little more money," and said complainant, suspecting a further attempt at blackmail, consulted the United States Attorney in and for the

District of Columbia and the Chief of the Detectives of the said District, and laid before them the circumstances of the case as then existing and known to him, the said complainant, and, under the direction of the said officials, detectives were detailed by the said Chief to work on the case and were present, concealed behind a screen, in a room where subsequent interviews were had by the said complainant and the said Hopp, and every such interview was had in the presence of such detectives, who advised the meetings and saw and heard all that was done or said thereat. At the first of the said interviews, the said complainant stated to the said Hopp that he, the said complainant, was sorry that he had not settled the case for five hundred dollars when he could have done so, and the said Hopp replied that it would have been better to settle in that way; whereupon the said complainant inquired of the said Hopp whether the sum of Twenty-five hundred dollars ($2500)
12 would settle the case, and, upon the said Hopp's stating in reply that he did not know but would have to see the said Hudson, said interview terminated. At a second interview, the said Hopp stated to the said complainant that the said Hudson declined to settle except in the presence of a notary public or his, the said Hudson's, attorney; and the said complainant manifested an anxiety to settle the matter and told the said Hopp to do the very best he could, but no definite offer was made; and, at the conclusion of the said interview, a further interview on the following day was agreed upon. At the said third interview, the said Hopp opened the conversation by saying to the said complainant, "Pickford, you are up against it; this man will not settle for less than eleven thousand, five hundred dollars ($11,500)". The said complainant pretended to assent to the said terms, and arrangements were then and there made for the payment of the amount of money so demanded; the sum of two hundred dollars in cash in marked bills was handed the said Hopp on account, and the said complainant gave to the said Hopp his, the said complainant's, promissory note to the order of the said Hopp for three thousand dollars, and further arrangements were made looking to the payment at a subsequent time, and later in the same day, of the balance of the said sum so demanded. Thereupon the said Hopp left the said complainant's place of business, followed by the said detectives, and went to his, the said Hopp's, own place of business on the south side of Pennsylvania Avenue near Seventh street, Northwest, in the City of Washington, and, when he, the said Hopp,
13 arrived there, the said Hudson was waiting for him, and they, the said Hopp and the said Hudson, were both arrested by the said detectives, without suggestion or request in that behalf from the said complainant. Several hours later, on the same day, the said complainant, being at his place of business, received a telephone message from the Chief of Detectives of the District of Columbia requesting him, the said complainant, to come to Police Headquarters, which the said complainant did, and was there told by the said detectives, or one of them, that the said Hopp and the said Hudson "had practically admitted their guilt,"

and that Hudson "had confessed that he was in a bad fix." Upon the suggestion of the said Chief of Detectives, the said complainant then went to the Police Court of the said District of Columbia and swore out a warrant charging the said Hopp and the said Hudson with conspiracy in an attempt at blackmail. When the hearing on the said charge was on in the said Police Court, the defendant, Henry M. Talbott, was present, showing a keen interest in the proceedings, and having, as he himself testified on the trial of the said cause numbered 45,662, come down from his home in the said town of Rockville to the said City of Washington to hear the said trial. Several days after the said hearing, the said complainant, Pickford, sued the said Hopp on a promissory note for the sum of two hundred and fifty dollars, before Charles S. Bundy, Esquire, a Justice of the Peace in and for the said District of Columbia, then having his office in the basement of the Fendall Building, at the corner of D street and John Marshall Place in
the said City of Washington, and, at the trial of the said
14 cause, the said Hudson appeared as a witness for the said Hopp. While the said trial was in progress, the said defendant, Henry M. Talbott, was standing on the street just outside of the office of the said Justice of the Peace, and several times called the said Hudson out of the room where the said trial was being had and talked with him in a very excited fashion, although the said defendant did not actually enter the courtroom of the said Justice of the Peace. While under cross-examination on the said trial, the said Hudson was asked, and testified, as follows:

"Q. You never told me just what you stated to the insurance company.

A. Now, Judge, had I better tell that? That will tend to incriminate me in the case in Maryland.

Q. You are not indicted in Maryland?

A. No, but I may be. I anticipate indictment in Maryland because I was informed by Mr. Talbott, the Prosecuting Attorney, that, as I had some knowledge, unless I made a full statement to him, he would consider me *particeps criminis* in the case. Before that I had appeared before the Grand Jury; made my statement, and the indictment was found. I did not know Mr. Pickford at the time."

12. Before pleading to the declaration in the said cause numbered 45,662 At Law, and before the trial thereof, the complainants, and each of them, and their counsel diligently inquired of every person believed and suspected by them, or any of them, to have any possible knowledge in the premises, with a view to obtaining and producing testimony tending to support a plea of justification in the said cause, and to prove the truth of the matter alleged as libelous in and by the said declaration in the said cause,
excepting, of course, the defendant, Henry M. Talbott, the
15 said Hopp, the said Hudson, and the agents and representatives of the said insurance companies supposed and believed to be interested in the premises in hostility to the complainants and their interests; and the complainants and their said counsel, since the trial of the said cause, have similarly diligently sought to ac-

quire testimony as aforesaid, but wholly in vain, until, on, to-wit, the 29th day of December, 1908, when one of the said counsel for the complainants, in an accidental meeting and conversation with one of the Judges of the said Circuit Court for Montgomery County, ascertained from the said Judge the following facts, which, on information and belief, the complainants aver to be true, namely:

Between the finding of the indictment aforesaid and the time the same was nolle prossed, as aforesaid, the said Judge had a conversation with the defendant, Henry M. Talbott, and asked the said defendant why he kept the said case open on the docket, in view of the opinion and decision of Mr. Justice Bradley, as aforesaid, in the soundness of which opinion and decision he, the said Judge, expressed his concurrence; whereupon the said defendant told the said Judge that he was keeping the said case open because he, the said defendant, had a large fee, to-wit, eleven thousand dollars, involved and which he, the said defendant, expected to get, through or because of a civil aspect of the case in which some insurance companies were interested; and, in the said conversation, the said defendant, in effect, stated, or caused the said Judge to understand and believe, and the said Judge did understand and believe,
16 that he, the said defendant, was keeping the said case open in order to get out of the complainants a large sum of money, to-wit, the sum aforesaid, for his, the said defendant's, personal gain and advantage.

13. Prior to the said 29th day of December, 1908, neither of the complainants, nor any of their counsel, had any knowledge, intimation, or suspicion of the conversation in the preceding paragraph narrated, and no one of them could, by the exercise of any diligence, have learned of the same save through communication thereof by either the said defendant, Henry M. Talbott, or the said Judge, and it did not occur to either of the complainants, or any one of their said counsel, that the said defendant could, or would, have made to any one the statements made by him in the said conversation, and especially it did not occur to the complainants, or either of them, or any of their counsel, that the said defendant could, or would, have made the said, or any such, statements to any judge of the court in which the said indictment was pending; and, had the complainants, or their counsel, heard that any such statement had been made by the said defendant, the complainants could, in the said case numbered 45,662, have pleaded justification and given in evidence the conversation in proof of the said alleged libel in the declaration in the said cause set forth, and the giving in evidence of the said conversation, in connection with the other matters and things given in evidence on the trial of the said cause, and especially the matters and things hereinbefore mentioned,
17 should, and would have caused the jury trying the said cause to render therein a verdict for the complainants, or the Judge presiding at the trial of the said cause to have set aside, and held for nothing, any verdict against the complainants rendered therein.

14. The trial of the said cause numbered 45,662 At Law resulted in a judgment, rendered on the 30th day of March, 1906, against

the complainants for the sum of eighty-five hundred dollars ($8500), which said judgment was finally affirmed by the Supreme Court of the United States on the 30th day of November, 1908. On the 24th day of June, 1907, the defendant, Lipscomb, who was one of the counsel of record of the defendant, Henry M. Talbott, in the said cause No. 45,662 At Law, assigned to the defendant, Woodard, all of his, the said Lipscomb's, interest in the said judgment in the said cause, in the words following, to-wit:

"JUNE 24, 1907.

For value received, I hereby assign and transfer to Henry F. Woodard all my title and interest in the judgment in the above entitled case.

ANDREW A. LIPSCOMB";

and, on the 3rd day of November, 1908, the defendant, Henry M. Talbott, caused the said judgment to be entered to the use of the defendant, Thomas M. Talbott, as follows:

"NOVEMBER 3, 1908.

The Clerk will enter the judgment in the above entitled case to the use of Thomas M. Talbott, subject to attorneys' claims for fees.

HENRY MAURICE TALBOTT";

and the defendants, Woodard and Thomas M. Talbott, now claim and assert, in and to the said judgment, the rights, respect-
18 ively, intended and appearing to have been assigned to, and vested in, them in the premises; and the writ of *fieri facias* upon the said judgment has been duly issued and placed in the hands of the defendant Palmer, Marshal as aforesaid, for execution, and execution thereof is about to be levied, and will be levied, by the said Palmer unless he be restrained and enjoined from so doing; and the complainant Pickford has been served with a writ of attachment and garnishment upon a judgment for nine thousand, nine hundred and twenty-one dollars and niety-five cents ($9,921.95), with interest from the 5th day of May, 1904, and eighty-seven dollars and ninety cents ($87.90), costs of suit, rendered against the defendant Lipscomb at the suit of one Henry Ann Stuart, in cause numbered 47,840, At Law, in the Supreme Court of the District of Columbia, and a writ of attachment on the said last mentioned judgment has been issued to, and is now in the hands of, the said Palmer, Marshal as aforesaid, for execution and a copy thereof has been likewise served upon the said complainant, Pickford.

15. The complainants duly appealed from the judgment aforesaid of the Supreme Court of the District of Columbia in said cause numbered 45,662 to the Court of Appeals of the District of Columbia, which latter court affirmed the said judgment, and the complainants thereupon duly sued out their writ of error from the Supreme Court of the United States to the said Court of Appeals in the premises, and, in each instance, namely, that of appealing

and suing out their writ of error, as aforesaid, the complain-
19 ants duly severally superseded the execution of the said judgment by giving bond in an amount and with surety approved, respectively, by the said Supreme Court of the District of Columbia and the said Court of Appeals, and the bonds of the complainants in the premises are still subsisting in full force and virtue, and are in amounts adequate, and with sureties sufficient, to secure the payment of the said judgment with all interests and costs, if the same be, or shall become, enforcible and collectible; and, moreover, the complainant, Pickford, is the owner and possessor in his own right, and free of incumbrance and of any and all liability anterior to that of the said judgment, of property, both real and personal, situate and located in the District of Columbia, in value greatly in excess of the amount of the said judgment, interests and costs, to which property the lien of the said judgment has attached, and of which property it is beyond the power of the said complainant to dispose without first satisfying the said judgment, interest and costs, if the same be, or shall become, enforcible or collectible, as aforesaid; Wherefore, the payment of the said judgment, whether now enforcible, or to become enforcible at any time during the possible pendency of the cause to be instituted by the filing of this bill of complaint, is fully and amply secured to the defendants, and each of them, and any and all persons who have, or may claim, any interest in, or right to, the said judgment, or any part of the same, or of the proceeds thereof.

16. The complainants are advised, and therefore aver, that, by reason of the premises, it would be contrary to equity and
20 good conscience that the defendants, or any of them, should be permitted to enforce or collect the said judgment, or any part thereof, or to assert and rely upon the same as a charge or demand upon, or against, the complainants, or either of them, or that the said judgment and the record in the said cause numbered 45,662 At Law should be allowed to be, and remain, in apparent force and effect against the complainants, or either of them.

17. The complainants file herewith, and pray leave to read at any hearing hereof, the affidavit of the Honorable James B. Henderson, Judge of the said Circuit Court for Montgomery County, in the twelfth paragraph of this bill mentioned, the same being marked "Complainants' Exhibit No. 2."

The premises considered, the complainants therefore pray as follows:

First. That process may issue to the defendants, and each of them, requiring them, and each of them, to appear to and answer, but not under oath, the exigency of this bill of complaint, the answer under oath of the said defendants, and each of them, being hereby expressly waived.

Secondly. That the complainants, and each of them, and their, and each of their, respective attorneys and agents, may, both during the pendency of this cause and on the final hearing hereof, be restrained and enjoined from collecting or enforcing, or attempting to collect or enforce, the said judgment, or to assert the same or

the record thereof as a charge or demand upon the com-
21 plainants, or either of them, or the property of either of them.

Thirdly. That the complainants may have such other and further relief in the premises as the nature of the case may require.

The defendants to this bill of complaint are Henry M. Talbott, Thomas M. Talbott, Aulick Palmer, Andrew A. Lipscomb and Henry F. Woodard.

THOMAS H. PICKFORD.
JOHN H. WALTER.

SAM'L MADDOX,
HENRY E. DAVIS,
Solicitors for Complainants.

DISTRICT OF COLUMBIA, *ss:*

Before me, a Notary Public in and for the District aforesaid, personally appeared Thomas H. Pickford and John H. Walter, each of whom, being by me first duly sworn, deposes and says that he has heard read the foregoing bill by him subscribed and knows the contents thereof, and that the statements therein made of his own knowledge are true, and those made on information and belief he believes to be true.

THOMAS H. PICKFORD.
JOHN H. WALTER.

Subscribed and sworn to before me this eighth day of January, 1909.

ERNEST M. HUNT,
[SEAL.] *Notary Public, D. C.*

22 COMPLAINANTS' EXHIBIT NO. 2.

Filed January 8, 1909.

In the Supreme Court of the District of Columbia.

Equity. No. 28244.

THOMAS H. PICKFORD AND ANOTHER, Complainant,
against
HENRY M. TALBOTT AND OTHERS, Defendants.

Affidavit to Accompany Bill.

COUNTY OF FREDERICK,
State of Maryland, ss:

Before me, a Notary Public in and for the County and State aforesaid, personally appeared James B. Henderson, who, being by me first duly sworn, deposes and says:

I am, and, for 13 years last past, continuously have been, one of

the Judges of the Circuit Court for the county of Montgomery, State of Maryland. I was such Judge at the time of the indictment of the complainants and others in the bill of complaint in the above entitled cause mentioned and at the time the same was nolle prossed, as therein alleged. Between the finding of the said indictment and the time the same was nolle prossed, I was aware of the action taken by Mr. Justice Bradley, of the Supreme Court of the District of Columbia, holding, in effect, that the said indictment was bad as not charging a crime in
23 law. After the said action of the said Justice, and while the said indictment was still pending, I had a conversation with the defendant, Henry M. Talbott, at that time State's Attorney for the said County of Montgomery, and, in the course of that conversation, I suggested to him that in view of Judge Bradley's decision, and the conclusion I had reached after examining the authorities, that it was useless to continue any further prosecution of the case. He rather disagreed with the conclusions of Judge Bradley and myself and he said he was very anxious to convict those people, or at least to keep the case open on the docket; that he represented the insurance companies that had paid the owners of the property a large sum of money which they wanted to recover back and that we have a large fee involved in the transaction. I understood that the fee was to be somewhere about $11,000.00 dollars.

He said that the pendency of the indictment would be of assistance in settling the insurance matter. I was somewhat surprised by the statements of the said Talbott in the said conversation, but did not mention the same to either of the complainants or any of their counsel until on or about the 29th day of December, 1908, when I casually mentioned the matter to one of the said counsel. I refrained from mentioning the same during the pendency of the said indictment or the subsequent libel suit between the said Talbott and the complainants herein, for the reason that I deemed it proper, in view of my position as a Judge as aforesaid, to maintain silence upon the subject while any phase of the matter was pending, and I did not mention the same to counsel, as aforesaid, with the pur-
24 pose or in expectation that the fact would be made use of in any way.

JAMES B. HENDERSON.

Subscribed and sworn to before me this 6th day of January 1909.

THOMAS A. CHAPLINE, J.,

[SEAL.] *Notary Public.*

25 *Restraining Order.*

Filed January 8, 1909.

* * * * * * *

Upon consideration of the bill of complaint and accompanying exhibits in the above entitled cause, it is, this 8th day of January, A.

D. 1909, adjudged and ordered that the above-named defendants, and each of them, and their, and each of their, agents and attorneys, be, and they hereby are, restrained and enjoined, as in and by the said bill of complaint prayed, from enforcing or collecting, or attempting to enforce or collect, the certain judgment in cause numbered 45,662 At Law on the dockets of this court, in the said bill described, until the further order of the court, to be made, if at all, after a hearing, which is hereby fixed for the 18th day of January A. D. 1909; provided that a copy of this order be served upon the said defendants, or such of them as may be found within the District of Columbia, Five days prior to said last mentioned day; and provided further that the complainants shall execute and file, though without a surety or sureties, the undertaking provided for by Equity Rule numbered 42 of this Court.

JOB BARNARD, *Justice.*

Marshal's Return.

Served copy of the within Restraining order on defendants as follows:

26 Henry M. Talbott and Henry F. Woodard personally, Jan. 9, 1909; Andrew A. Lipscomb personally, Jan. 11, 1909; no copy for Thomas M. Talbott, Jan. 13, 1909.

AULICK PALMER, *Marshal.*
H.

JAN. 8, 1908.

Service of restraining order in this case is hereby accepted.

AULICK PALMER,
U. S. Marshal,
By W. B. ROBISON,
Ch'f Dep. Marshal.

Answer of Henry F. Woodard.

Filed January 11, 1909.

* * * * * * *

Comes now Henry F. Woodard, one of the defendants in the above entitled cause, and for answer to so much of the said bill as he is advised it is necessary for him to make answer unto, saith:

This defendant hath no knowledge of and concerning the matter and things set forth in said bill except with reference to the assignment by the defendant, Andrew A. Lipscomb, to this defendant of all his title and interest as set forth in paragraph 14 of said

27 bill, which said assignment he admits to be the fact, nothing in the second paragraph of the said bill of complaint to the contrary notwithstanding, and this defendant having fully answered, prays to be hence dismissed with reasonable costs in this behalf sustained.

HENRY F. WOODARD,
In Proper Person.

Demurrer, Affidavit and Certificate of Andrew A. Lipscomb.

Filed March 2, 1909.

* * * * * * *

This defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said bill of complaint, to be true in such manner and form as the same are therein set forth and alleged, does demur thereto, and for cause of demurrer says, that it appears by the complainants' own showing by said bill of complaint, that they are not entitled to the relief prayed by said bill against this defendant, or against any of the defendants, for that there are no sufficient allegations of fraud in the procurement of the judgment therein prayed to be set at naught as would entitle the complainants to the relief prayed against the defendants.

Wherefore and for divers other good causes of demurrer appearing in the said bill, the defendant does demur thereto and prays judgment of this court whether he shall be compelled to
28 make any further or other answer thereto and to be hence dismissed with his costs in this behalf sustained.

ANDREW A. LIPSCOMB,
For Himself.

Personally appeared Andrew A. Lipscomb who on oath says that the above demurrer is not interposed for delay and he hereby certifies that in his opinion the said demurrer is well founded in law.

ANDREW A. LIPSCOMB.

Subscribed and sworn to before me this 2nd day of March 1909.

J. R. YOUNG, *Clk.*
By F. E. CUNNINGHAM, *Ass't Clk.*

Answer of Henry M. Talbott.

Filed March 2, 1909.

* * * * * * *

The defendant Henry M. Talbott, for answer to the bill in this cause says:

1. He admits the averments of paragraph one of said bill.
2. He admits the averments of paragraph two of the bill except he denies that Thomas M. Talbott was in any sense a pre-
29 tended assignee of the judgment referred to and says that the assignment to him was bona fide. He further says that said Thomas M. Talbott has since re-assigned said judgment to this defendant.
3. He has no personal knowledge concerning the averments of paragraph three of the bill and can neither admit nor deny the same, he is advised and avers that they are wholly immaterial but if deemed material by the Court he requires strict proof thereof.
4. He admits the averments of paragraph four of the bill.

5. He has no personal knowledge concerning the averments of paragraph five of the bill and if the same be material he requires strict proof thereof.

6. He admits that in the month of March, 1901, the complainants and one Shaw and one Bradshaw were indicted by the grand jury in and for the County of Montgomery, Maryland, and that at the time he was State's Attorney. He says that said indictments were not in anywise "procured" by him except that in the proper discharge of his official duties he submitted to the grand jury the testimony of a witness named Hudson, this defendant was not present at the time when the said witness testified before the grand jury but says that his testimony evidently impressed the said jury as strongly as it had already impressed this defendant. It is also true that this defendant as was his duty caused the necessary process to be issued upon the indictments.

7. He admits the averments of paragraph seven of the
30 bill.

8. He admits that in the month of November, 1901, the complainant Pickford attended the session of the Circuit Court for Montgomery County but whether he was accompanied by witnesses to support his defense this defendant does not know and if material requires strict proof thereof. It is also true that this respondent informed the Court that owing to his inability to obtain the presence of certain witnesses he was not ready then to go to trial and that he asked a postponement of said trial. He also admits that said postponement was denied, an additional reason moving this defendant to ask for a postponement was that he desired an opportunity to consider more fully the effect of a decision recently made by the Justices then presiding in a case heard by them in Frederick County in the same Circuit, which decision was not rendered until after the said indictments had been found. He does not remember the exact language used by the Court and says that he is advised and avers that if correctly quoted it is wholly immaterial in this cause. It is also true that for the reasons heretofore stated this respondent then entered a nolle prosequi.

9. He admits the averments of paragraph nine to be true.

10. He says that the cause of action set forth in said cause numbered 45662, fully appears from the declaration a copy of which is made part of the bill, and to which he refers. He does not know what complainants may have believed concerning said indictments at the time said declaration was filed nor what advice was
31 given to complainants by their counsel, nor what efforts were made by the complainants to obtain evidence. He is not surprised that complainants were wholly unable to obtain any evidence to justify their publication of said libel because he says no such evidence existed. It will appear however from the averments of the bill that great latitude was allowed to complainants in offering testimony in support of their defense in said action and he says that by their own averments it appears that all the testimony tendered by the defendants as tending to impugn the good faith of this respondent in connection with said indictments was allowed by the

trial justice to be offered. The only restrictive ruling of said trial justice having been expressly approved both by the Court of Appeals and the Supreme Court of the United States.

11. While it is not possible for this defendant to say whether the statement of the testimony offered on behalf of the complainants as contained in paragraph 11 of the bill is accurate, he does admit that the substance thereof appears to be given and he calls the attention of the Court to the character of said testimony as corroborating this defendant's contention that under the rulings of the trial justice the fullest opportunity was given to the complainants to introduce all testimony which they desired. This defendant however does not admit the truth of said testimony and says that the jury evidently gave it no credence. So far as said testimony purports to relate to him as it is quoted in said paragraph he says that
32 having learned of the trial before Justice of the Peace, Bundy he endeavored to ascertain whether any testimony developed there indicated the truth of the charges made by the complainant Pickford against said Hudson and for the same purpose this defendant attended the hearing in the Police Court and he was not convinced by the proceedings in either case of the truth of said charges and he further says that in an action brought by said Hudson against said Pickford in the Supreme Court of the District of Columbia a jury has likewise declined to accept said Pickford's version of the relations between said Pickford and said Hudson. The seventy-five dollar check referred to in said paragraph was given by the defendant to said Hudson as a loan to enable him to prevent foreclosure of a chattel deed of trust upon certain personal property of said Hudson who was in great financial distress and appealed to this defendant's sympathy and he says that the note taken up by said check is still in this defendant's possession and unpaid.

12. Answering paragraph twelve of the bill this defendant says: That he does not of course know what transpired in the conferences between complainants and their counsel nor what action was taken by them in preparing their defense in said action at law and so far as material he requires strict proof thereof, but he further says that upon their own statement they deliberately considered and weighed all possible defenses and finally for motives best known to themselves selected a line of defense in respect of which a jury of their fellow townsmen declined to believe them although in con-
33 nection with that defense they were allowed the great latitude of proof shown by their averments as to the testimony offered. It does appear from the bill, however, that no inquiry was made of Judge Henderson as to his knowledge concerning the good faith of the prosecution although it must have occurred to complainants and their counsel that if any evidence of want of good faith in connection with the prosecution existed, said Judge would be likely to know the facts in that regard. This defendant has no knowledge concerning the time the place and circumstances of the "accidental meeting" between counsel for complainants and Judge Henderson, nor of what was then said and so far as material

he requires strict proof thereof, but he denies that any such conversation as is alleged in the bill and the affidavit of Judge Henderson ever occurred. He denies that said Judge ever asked him why he kept the cases open on the docket and he says that said cases were not kept open on the docket but were proceeded in, in the same manner as in all other criminal cases in that Court. The indictments were all found March 27, 1901. Complainant Pickford gave bail March 29, 1901. The other defendants resisted extradition and in the summer of 1901 Justice Bradley decided in their favor. This decision of course did not settle the merits of the cases and the Circuit Court of Montgomery County would not have allowed complainant Pickford to be tried at the March term and the others at a later term because of the increased expense to the County, and the additional labor imposed upon the Court. There was no criminal term between March and November, when the cases could have been tried.

34 He denies that he ever told said Judge that he (this defendant) was keeping the cases open because he had a large fee or any fee involved, or that it amounted to $11,000. or any other sum or that he expected to get it through a civil aspect of the case in which some insurance companies were interested and this defendant says that never at any time or place, or in any manner or form, or for any fee or any amount was he ever directly or indirectly employed by, or in anywise on behalf of, said insurance companies, or any one of them, or any one representing them or any of them to do or to omit to do, anything, or to take any action whatsoever in the interests of said companies or of any one of them, either in recovering money paid by them, or otherwise, or for any other purpose whatsoever. This defendant denies that said Judge understood and believed that this defendant was keeping said cases open in order to get from complainant a large sum, or any sum of money for his personal gain or advantage, or for any other purpose. The fact is that before the evidence was submitted by this defendant to the grand jury of Montgomery County, he carefully conferred with said Judge as to the sufficiency of the evidence to warrant indictment and as to the form of the indictment, and said Judge fully concurred with this defendant that the cases should be submitted to the grand jury and expressed the opinion that the evidence then obtainable from Hudson and other sources was sufficient to warrant indictment for statutory burning under the code of Maryland. Not only is this true but at this defendant's

35 suggestion a committee from the grand jury also consulted said Judge before presentments were found.

The nearest approach to any such conversation as is set forth in the bill, and said affidavit, is that on one occasion when these indictments were under discussion between this defendant and said Judge, either he or this defendant expressed the opinion that the insurance companies could recover what they had paid complainants.

13. This defendant does not know what knowledge or suspicions complainant may have had or entertained prior to December 29,

1908, but he says that by timely inquiry of said Judge, seven years ago they could have elicited his then clear recollection of the facts surrounding said indictment and of any supposed conversation between said Judge and this defendant, and he says that had such inquiry then been made, the recollection of said Judge would have agreed with that of this defendant. Further answering he says that it by no means follows that if said alleged conversation had been brought to their attention before pleading the complainants would have pleaded differently, because not only do they not allege in their bill that they would have done so, contenting themselves with the weak averment that they "could" have done so, but in view of the fact that by their rigid investigation they have been unable to discover any evidence of bad faith they would not have taken the risk of relying upon an alleged conversation, testimony concerning which would be subject to the test of cross examination and especially in view of the fact well known to their counsel that if the pleadings had been such as to admit of such testimony they would have opened the door to an investigation concerning
36 the truth as to the origin of the said fire and that Hudson's knowledge on that subject would be elicited making it inevitable that Shaw must have been called by complainants and would have been subject to the probe of cross examination unless he could have protected himself by refusal to answer on constitutional grounds and it is submitted to the Court that these considerations might well have given the complainants pause.

They were permitted to go at length into their beliefs and suspicions as appears from the copious averments of the bill and yet their story was not accepted by the jury, the accuracy of whose finding that the libel was procured to be published by the complainants is now vindicated by the averments of the bill which by necessary inference admit that the denial of publication was not justified.

This complainant further denies that the introduction of evidence of said conversation would have changed the result because publication being admitted the burden of proof would have been upon complainants to show the truth of the libel and in the light of the action of the jury when the character of additional proof which could have been made in the case as heretofore stated is considered coupled with this defendant's denial of any such conversation or the existence of any such motive fortified as it would have been by the testimony of the representatives of the insurance companies absolutely negativing any employment of this defendant, or any relations between him and them, it cannot be doubted that the verdict would have been the same except that the unsuccessful
37 errors at justification would have greatly increased its amount.

This defendant further says that all his denials of employment by or relations with said insurance companies apply as well to the firm of Talbott & Talbott of which he is a member as to himself.

Defendant further says that there is no pretence in the bill that he in anywise obstructed any efforts of complainants to obtain testi-

mony, on the contrary, he is shown by the record in the action to have invited full cross-examination on the subject of his good faith.

14. This defendant admits the averments of paragraph fourteen of the bill and says as hereinbefore set forth that said Thomas M. Talbott has reassigned said judgment to this defendant and said Thomas M. Talbott no longer has any interest therein.

15. He admits the averments of paragraph fifteen of the bill.

16. He denies the averments of paragraph sixteen of the bill and says that no showing has been made by complainants to entitle them to enjoin the collection of said judgment in cause numbered 45662 at law, on the contrary he says that his cause of action having been fully litigated in the trial Court, in the Court of Appeals and in the Supreme Court of the United States and in all those Courts having been decided in his favor the complainants should not now be allowed to re-try the case in this court and he claims the same benefit of this objection as if raised by demurrer.

17. Answering paragraph seventeen, he denies the aver-
38 ments contained in the affidavit therein referred to and refers to what he has already said in answer to the averments of the bill concerning said affidavit.

Further answering this defendant says that the complainants have not in and by their said bill made or stated any such case as entitles them to relief in this cause and he claims the same benefit of this objection as if raised by demurrer.

And having fully answered, he prays to be hence dismissed with his costs.

HENRY MAURICE TALBOTT.

JNO. RIDOUT,
For Def't.

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof; that the facts therein stated upon my personal knowledge are true and the facts therein stated upon information and belief, I believe to be true.

HENRY MAURICE TALBOTT.

Subscribed and sworn to before me this 2 day of March, 1909.

JNO. R. YOUNG, *Clerk.*
By R. P. BELEW, *Ass't Clerk.*

39 *Answer of Aulick Palmer, United States Marshal.*

Filed March 3, 1909.

* * * * * * *

The defendant Aulick Palmer, United States Marshal, in and for the District of Columbia for answer to so much of the bill as he is advised it is material for him to answer, says:

He admits the averments of paragraph fourteen of the bill so far as they relate to the writ of fieri facias issued upon the judg-

ment therein referred to and to the writ of attachment and garnishment in cause No. 47840, at law, in the Supreme Court of the District of Columbia.

He has no personal knowledge of the other matters and things averred in the bill and can neither admit nor deny the same.

And having fully answered he prays to be hence dismissed with costs.

AULICK PALMER,
U. S. Marshal,
By W. B. ROBISON,
Chief Deputy Marshal.

Subscribed and sworn to before me this Third day of March, 1909.

JOHN R. YOUNG,
Clerk Supreme Court D. C.
By J. A. C. PALMER, *Asst.*

40 *Motion to Dissolve Restraining Order, &c.*

Filed March 16, 1909.

* * * * * * *

Now comes the defendant Henry M. Talbott, by his Solicitor and upon the answer heretofore filed by him, and the affidavits, filed with and in support of this motion, moves the Court to dissolve the restraining order heretofore granted in this cause.

JNO. RIDOUT,
Solicitor for said Defendant.

Messrs. Maddox & Gatley, Henry E. Davis, Solicitors for Complainants:

Please take notice that the above motion, answer and affidavits will be submitted to the Court on Friday, March 26th 1909, at 10 o'clock a. m., or as soon thereafter as counsel can be heard.

JNO. RIDOUT,
Solicitor for said Defendant.

41 Consulate
of the
United States of America.
Toronto, Canada.

I, the undersigned, Consul of the United States of America at Toronto, Province of Ontaria, Dominion of Canada, do hereby certify that John H. Hunter, whose name is affixed to the attached document, was, at the time the same was affixed, a Notary Public in and for the Province of Ontario, Dominion of Canada.

Given under my hand and seal of office, at Toronto, Ontario, this 8th day of February, 1909.

R. S. CHILTON, JR.,
[SEAL.] *Consul of the United States of America.*

Feb. 8, 1909. ($2 Fee Stamp.) Fee No. 52.

* * * * * * *

I, Grayson Burruss, make oath and say:

1. That I was the adjuster who acted for the Western Assurance Company and the British America Assurance Company which carried policies upon the property owned by Thomas H. Pick-
42 ford and John H. Walter and which was burned in September, 1897;

2. That I did not at any time employ or retain Henry Maurice Talbott or the firm of Talbott and Talbott nor to the best of my knowledge and belief did said Companies ever employ or retain said Henry Maurice Talbott or the firm of Talbott and Talbott directly or indirectly to recover back the money paid by them or either of them under said policies or for any other purpose whatever.

GRAYSON BURRUSS.

Subscribed and sworn to before me this eighth day of February, 1909.

[SEAL.] JOHN H. HUNTER,
A Notary Public in and for the Province of Ontario.

* * * * * * *

I, Peter Harvey Sims, make oath and say:

1. That I am the Secretary of the British America Assurance Company which carried a policy upon the property owned by Thos. H. Pickford and John H. Walter near Sligo in Montgomery County, Maryland, and which was burned in September, 1897;

2. That I did not at any time, nor to the best of my knowledge and belief, did the said Company or anyone acting in its
43 behalf ever employ or retain directly or indirectly Henry Maurice Talbott or the firm of Talbott and Talbott to recover back the money paid by said Company under said policy or for any other purpose whatever.

P. H. SIMS.

Subscribed and sworn to before me this Eighth day of February, 1909.

[SEAL.] JOHN H. HUNTER,
A Notary Public in and for the Province of Ontario.

* * * * * * *

I, Charles Colley Foster, make oath and say:

1. That I am the Secretary of the Western Assurance Company which carried a policy upon the property owned by Thos. H. Pickford and John H. Walter near Sligo in Montgomery County, Maryland, and which was burned in Septemner, 1897:

2. That I did not at any time, nor to the best of my knowledge and belief, did the said Company or anyone acting in its behalf ever employ or retain directly or indirectly Henry Maurice Talbott or the firm of Talbott and Talbott to recover back the money paid by said Company under said policy or for any other purpose whatever.

C. C. FOSTER.

44 Subscribed and sworn to before me this Sixth day of February, 1909.

[SEAL.]

JOHN H. HUNTER,
A Notary Public in and for the Province of Ontario.

* * * * * * *

I, William Hall on oath say that during the years 1900 and 1901 I was the Agency Secretary of the Delaware Insurance Company, which was one of these which issued a policy upon the dwelling house in Montgomery County, Maryland, which was owned by Thomas H. Pickford and John H. Walter at the time it was destroyed by fire in September, 1897. Afterwards the Company made a compromised settlement of the claim under said policy; said Company never directly or indirectly employed or retained Henry M. Talbott or the firm of Talbott and Talbott to act or represent it in any effort or plan to recover back the money so paid, or any part of it, or for any other purpose; or to render any legal service to said Company, and indictments of said Pickford and Walter and Granville G. Shaw and Aaron Bradshaw were not procured either directly or indirectly at the instance of or in any wise for the benefit of said Company.

WILLIAM HALL.

Subscribed and sworn to before me this Twenty-fifth day of
45 February 1909.

[SEAL.]

THOS. A. MacDONALD,
Notary Public.

Commission Expires Jan. 16, 1913.

STATE OF MINNESOTA,
County of Ramsey, To wit:

I hereby certify that on this eleventh day of March in the year 1909 before the subscriber, a Notary Public in and for said State and County personally appeared A. W. Perry, Secretary of the St. Paul's Fire and Marine Insurance Company, and made oath as

follows; that he was the Secretary of said Company in the years 1897 to 1901 inclusive, that under policy issued by said Company No. 495 to Thomas H. Pickford and John H. Walter on property located in Montgomery County, State of Maryland, said Company sustained a loss which loss was paid, and that neither the files of the office, nor my recollection connect in any way with said loss, either a certain H. Maurice Talbott or the law firm of Talbott and Talbott.

A. W. PERRY.

Sworn before.
[SEAL.] ALEX LAWSON,
Notary Public, Ramsey County, Minnesota.

Commission expires July 24, 1914.

46 STATE OF PENNSYLVANIA,
City of Philadelphia, To wit:

I hereby certify that on this the 24th day of February, in the year 1909, personally appeared before me, the subscriber, a Notary Public in and for said State and City, Eugene L. Ellison, the Vice President of the Insurance Company of North America, and made oath as follows: That he was Vice President of said Company during the years 1900 and 1901 inclusive, and that all records of said Company pertaining to and relating to policy #72551, issued to Thomas H. Pickford and John H. Walter, on property located in Montgomery County, State of Maryland, were inadvertently destroyed, and also that neither this affiant nor any other officer, agent, or employee of this Company, to the best of his knowledge and belief, either directly or indirectly, employed Henry M. Talbott, or the firm of Talbott and Talbott, to recover back the money so paid by this Company by reason of said loss, or for any other purpose whatever.

EUGENE L. ELLISON.

Sworn and subscribed to before me this 24th day of February 1909.
Witness my hand and Notarial Seal.
[SEAL.] THOS. A. MACDONALD,
Notary Public.

Commission Expires Jan. 16, 1913.

* * * * * * *

47 I, Wm. A. Holman on oath say that during the years 1900 and 1901 I was the Manager of the Philadelphia Underwriters Insurance Company, which was one of these which issued a policy upon the dwelling house in Montgomery County, Maryland, which was owned by Thomas H. Pickford and John H. Walter at the time it was destroyed by fire in September, 1897. Afterwards the Company made a compromise settlement of the claim under policy; said Company never directly or indirectly

employed or retained Henry M. Talbott or the firm of Talbott and Talbott to act or represent it in any effort or plan to recover back the money so paid, or any part of it, or for any other purpose; or to render any other legal service to said Company, and indictments of said Pickford and Walter and Granville G. Shaw and Aaron Bradshaw were not procured either directly or indirectly at the instance of or in anywise for the benefit of said Company.

WM. A. HOLMAN.

Subscribed and sworn to before me this 27th day of January, 1909.

JOS. H. HUGHES,
[SEAL.] *Notary Public.*

My commission expires Jan. 21st, 1911.

* * * * * * *

48 I, J. L. Cunningham on oath say that during the years 1900 and 1901 I was the President of the Glens Falls Insurance Company, which was one of these which issued a policy upon the dwelling house in Montgomery County, Maryland, which was owned by Thomas H. Pickford and John H. Walter at the time it was destroyed by fire in September, 1897. Afterwards the Company made a compromise settlement of the claim under policy; said Company never directly or indirectly employed or retained Henry M. Talbott or the firm of Talbott and Talbott to act or represent it in any effort or plan to recover back the money so paid, or any part of it, or for any other purpose; or to render any other legal service to said Company, and indictments of said Pickford and Walter and Granville G. Shaw and Aaron Bradshaw were not procured either directly or indirectly at the instance of or in anywise for the benefit of said Company.

J. L. CUNNINGHAM.

Subscribed and sworn to before me this thirtieth day of January, 1909.

CUTLER DE LONG,
[SEAL.] *Notary Public.*

* * * * * * *

49 I, James H. Brewster on oath say that during the years 1900 and 1901 I was the United States Manager of the Scottish Union & National Insurance Company, which was one of these which issued a policy upon the dwelling house in Montgomery County, Maryland, which was owned by Thomas H. Pickford, and John H. Walter at the time it was destroyed by fire in September, 1897. Afterwards the Company made a compromise settlement of the claim under said policy; said Company never directly or indirectly employed or retained Henry M. Talbott or the firm of Talbott & Talbott to act or represent it in any effort or plan to recover back the money so paid, or any part of it, or for any other purpose; or to render any other legal service to said Company, and

indictments of said Pickford and Walter and Granville G. Shaw and Aaron Bradshaw were not procured either directly or indirectly at the instance of or in anywise for the benefit of said Company.

JAMES H. BREWSTER.

Subscribed and sworn to before me this fifteenth day of February, 1909.

WILLARD H. BRUCE,
[SEAL.] *Notary Public.*

* * * * * * *

50 (German American Ins. Co. Jan. 26, 1909. Received.)

I, Wm. N. Werner on oath say that during the years 1900 and 1901 I was the President of the German American Insurance Company, which was one of these which issued a policy upon the dwelling house in Montgomery County, Maryland, which was owned by Thomas H. Pickford and John H. Walter at the time it was destroyed by fire in September, 1897. Afterwards the Company made a compromise settlement of the claim under said policy; said Company never directly or indirectly employed or retained Henry M. Talbott or the firm of Talbott and Talbott to act or represent it in any effort or plan to recover back the money so paid, or any part of it, or for any other purpose; or to render any legal service to said Company, and indictments of said Pickford and Walter and Granville G. Shaw and Aaron Bradshaw were not procured either directly or indirectly at the instance of or in anywise for the benefit of said Company. To the best of my knowledge & belief.

WM. N. WERNER.

Subscribed and sworn to before me this fourth day of February, 1909.

LOUIS A. TRUSLOW,
[SEAL.] *Notary Public for Kings County.*

Certificate filed in New York County.

* * * * * * *

51 DISTRICT OF COLUMBIA, *ss:*

I, Henry M. Talbott, on oath say that since the institution of this suit I have been in constant correspondence with the insurance companies which were interested in the loss of the Pickford and Walter property in Montgomery County, Maryland, referred to in this cause by reason of the fire of September 13th, 1897, and that this affiant has secured affidavits from officers representing all the companies so interested except the Armenia Insurance Company of Pittsburg and the Western Insurance Company of Pittsburg, Pennsylvania..

The first of these companies was reorganized under the name of the Guardian Insurance Company and having gone into the hands

of a receiver its records for the period covered by the said loss and the subsequent indictments have not been obtainable.

The records of the Western Insurance Company of Pittsburg, have been stored and no papers relating to the said loss have been found.

Because of the inability to find these papers this affiant has not been able to obtain any affidavit from any officer now representing either of said companies.

This affiant reiterates what is said in his answer, namely, that neither he nor the firm of Talbott and Talbott was ever directly or indirectly employed by either of the two companies above
52 mentioned or any of the other companies interested in said loss to act for or represent any one of them in any effort or plan to recover back the money paid by them or any of them on account of said loss or any part of it or for any other purpose, or to render any legal services to any one of said companies and the indictments of said Pickford and Walter and Granville C. Shaw and Aaron Bradshaw were not procured either directly or indirectly at the instance of or in anywise for the benefit of any one of said companies.

HENRY M. TALBOTT.

Subscribed and sworn to before me this 16th day of March, A. D., 1909.

J. WM. REILY,
[SEAL.] *Notary Public, D. C.*

53 *Amendments to Bill.*

Filed April 6, 1909.

* * * * * * *

Come now the complainants, and, by leave of the Court in that behalf first had and obtained, amend and supplement their original bill of complaint in the above entitled cause as follows:

First. By inserting after the third paragraph of the said bill a new paragraph, to become paragraph numbered four, as follows:

4. When the making of the certain alterations and repairs to the improvements upon the property aforesaid, in the third paragraph above alleged, was entered upon and while the same was in progress, one Granville C. Shaw was employed by the complainants to superintend the same, and accordingly assumed, and was in, charge thereof. While the said Shaw was so employed and engaged he was residing at or near the village of Good Hope, in the District of Columbia, and had at the time as a guest at his home one James Hudson, a painter by trade; and, while the said alterations and repairs were in progress, the said Hudson visited the property aforesaid, on which the same were being made, and applied for the work of doing the painting connected therewith, but his request in this behalf was denied by the said Shaw, and the said Hudson did not get the said work. While at the said property, as aforesaid, the said

Hudson went over the said mansion-house and into a certain tower room, a part thereof, in which at the time was a quantity of shavings, litter and similar materials, and the said Hudson remarked concerning the dangerous character of the same in respect of liability to fire. The fire aforesaid in fact occurred shortly after the visit of the said Hudson aforesaid, and during the absence from the property of the complainants and the said Shaw, and, as the complainants are informed and believe, and therefore aver, while no person was in or about the premises. Some time after the said fire, the said Hudson stated to the said Shaw that if he, the said Shaw would go to the office of the defendant Lipscomb with him, the said Hudson, they, the said Shaw and the said Hudson, could arrange to get a lot of money out of the complainant Pickford, but the said Shaw declined so to do, and never again talked with
54 the said Hudson on the subject. In the meanwhile, between the visit of the said Hudson to the said property and the conversation in which the said Hudson stated to the said Shaw, as aforesaid, the said Hudson had been asked by the said Shaw to leave his, the said Shaw's house, which he, the said Hudson did, and thereafter he manifested great displeasure towards the said Shaw, and, as the complainants believe, and therefore aver, entertained enmity and hostility against and towards him, the said Shaw, by reason of the premises. In connection with the allegations and averments of this paragraph, the complainants file herewith, and pray leave to read at any hearing hereof, the affidavit of the said Granville C. Shaw, marked "Complainants' Exhibit No. 3."

Secondly. By changing the number of the fourth paragraph of the said bill from four to five.

Thirdly. By striking from the said bill paragraph numbered five, and inserting, in lieu thereof, a new paragraph, to become paragraph numbered six, as follows:

6. While the said Kilgour was State's Attorney, as aforesaid, and some time after the insurance companies aforesaid had paid the said sum of twenty-two thousand five hundred dollars ($22,500), the defendant Lipscomb requested the said Kilgour to visit him, the said Lipscomb, at his office in the City of Washington, District of Columbia, on a matter stated by the said defendant to be of great importance in connection with the office of him, the said Kilgour, and, in response to said request, the said Kilgour visited the said defendant at his said office and there had a conversation with him in which the said defendant represented and stated that he was the attorney for the said insurance companies; that said companies suspected certain persons of having burned the said house; and that they, the said companies, had paid the losses caused by the burning of the same and did not care what became of the money so paid if the complainants could be made to pay it back; and, in said conversation, the said defendant further stated to the said Kilgour that a fee of twenty-two thousand dollars could be made in the matter; and that he would divide the same with the said Kilgour. In a subsequent conversation, the said defendant again stated to the said Kilgour that the said insurance companies did not desire themselves to recover any of the money aforesaid, but that he and the said

Kilgour could make a fee of eleven thousand dollars apiece in the matter. In response to the statements and suggestions of the
55 said defendant, the said Kilgour declared that his said office could not be used for the purpose of collecting money in any such way, and declined to present the matter to the Grand Jury of said County of Montgomery, as the said defendant had requested him to do, said Kilgour adding that, if the said defendant had testimony showing that anybody had been guilty of a crime in the premises, he, the said Kilgour, would see that the same was properly presented and considered by that body; and thereafter, during the incumbency by the said Kilgour of the said office, the said defendant never again referred to the matter. And prior to the indictment of the complainants, hereinafter mentioned, the defendant, Henry M. Talbott, never at any time conferred or communicated with the said Kilgour in relation to the fire aforesaid, and never asked the said Kilgour whether the matter had been brought to his, the said Kilgour's, attention; but, on the contrary, the said defendant Talbott, in causing and procuring the said indictment, as hereinafter alleged, proceeded entirely of his, the said defendant Talbott's own motion, although, as he, the said defendant, well knew, the said fire had occurred during the term of office of the said Kilgour, and more than two years before the said defendant Talbott became State's Attorney, as aforesaid. In connection with the allegations and averments of this paragraph, the complainants file herewith, and pray leave to read at any hearing hereof, the affidavit of the said Alexander Kilgour, marked "Complainants' Exhibit No. 4."

Fourthly. By changing the number of the sixth paragraph of the said bill from six to seven, and by substituting for the word "one", in the seventh line of the said paragraph, the words "the said."

Fifthly. By inserting in the said bill a new paragraph, to become paragraph numbered eight, as follows:

8. The complainants aver and charge that the said indictment was caused by the said defendant Lipscomb and the said Hudson to be obtained by the said defendant, Henry M. Talbott, from the Grand Jury aforesaid as such, or a similar, indictment had, by the said Lipscomb and Hudson, theretofore unsuccessfully been sought to be obtained by the said Kilgour, while State's Attorney, as aforesaid; and, by reason of the premises hereinbefore recited and set forth, the complainants aver and charge that the defendants, Lipscomb and Henry M. Talbott, and the said Hudson, caused
56 and procured the said indictment of the complainants by and through a conspiracy made and entered into for that purpose by them, the said Lipscomb, Talbott and Hudson, and with the object and purpose of using the same as a means to extort from the complainants, or either of them, the said sum of twenty-two thousand, five hundred dollars, or so much thereof as might be extorted, and that the said indictment was caused and procured, and all the matters and things relating thereto done and performed by the said defendant Talbott, so done and performed, in pursuance of the said conspiracy and as part thereof, and with the object and intent of accomplishing the said purpose thereby intended; and,

accordingly, that the said defendant Talbott was in the premises, in fact, guilty of abusing his official position and prostituting the said office of State's Attorney, and using his said office for his personal ends and gains.

Sixthly. By striking out the period at the end of the eighth paragraph of the said bill, and adding to the said paragraph the following:

as to the complainant Pickford. And afterwards the complainant Walter gave bail at the said town of Rockville to the said indictment and tendered himself ready to be tried thereon, but the said defendant Talbott would not, and did not, undertake to try the said complainant Walter on the said indictment, but nolle prossed and abandoned the same as to the said complainant also.

Seventhly. By inserting in the thirteenth paragraph of the said bill the following:

After the word "could", in the eighteenth line of the said paragraph, the words "and would"; before the word "conversation", in the nineteenth line, the word "said"; and after the said word "conversation", in the said line, the words "together with the matters and things in the fourth and sixth paragraphs above set forth"; and after the word "conversation", in the twenty-second line, the words "matters and things."

Eighthly. By adding to the fourteenth paragraph of the said bill, the following:

57 Since the filing of the original bill herein the defendant, Henry M. Talbott, has asserted and claimed, and now asserts and claims, that the said judgment in said cause numbered 45,662 has, by the defendant, Thomas M. Talbott, been reassigned to him, the said Henry M. Talbott, by reason whereof it is claimed by said Henry M. Talbott that the said Thomas M. Talbott has no longer any interest in the premises; but the said alleged reassignment by the said Thomas M. Talbott to the said Henry M. Talbott does not appear of record in the said cause, wherefore the complainants aver that the said Thomas M. Talbott still appears of record as the assignee of the said judgment, as aforesaid.

Ninthly. By adding to the fifteenth paragraph of the said bill the following:

And the said defendant, Henry M. Talbott, is wholly insolvent, and, should the amount of the said judgment, or any part thereof, be collected by, or paid to, him, the said Henry M. Talbott, and it be finally determined that the same should not so have been collected or paid, the complainants, and each of them, will be wholly unable to recover of the said defendant the amount so collected or paid, or any part thereof, and would thereby be left remediless in that behalf.

Tenthly. By substituting for the word "complainants", in the first line of the second prayer, the word "defendants."

Eleventhly. By changing the number of paragraphs seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen and

seventeen to numbers nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen and nineteen, respectively.

THOMAS H. PICKFORD.
JOHN H. WALTER.

MADDOX & GATLEY,
HENRY E. DAVIS,
Solicitors for Complainants.

58 DISTRICT OF COLUMBIA, *ss:*

Before me, the undersigned, a notary public in and for the District aforesaid, personally appeared Thomas H. Pickford and John H. Walter, each of whom, being first duly sworn according to law, depose and says: that he has heard read the foregoing amendments and supplement to the original bill of complaint in the above-entitled cause and knows the contents thereof, and that the statements therein made of his own knowledge are true and those made on his information and belief he believes to be true.

THOMAS H. PICKFORD.
JOHN H. WALTER.

Subscribed and sworn to before me this 2nd day of April, 1909.

JAMES B. NICHOLSON,
[SEAL.] *Notary Public, D. C.*

(Endorsed:) Leave is hereby granted to file the within amendments without prejudice to the restraining order heretofore issued in this cause.

JOB BARNARD, *Justice.*

COMPLAINANTS' EXHIBIT No. 3.

Filed April 6, 1909.

* * * * * * *

DISTRICT OF COLUMBIA, *ss:*

Before me, the undersigned, a notary public in and for the
59 District aforesaid, personally appeared Granville C. Shaw, who, being first duly sworn according to law, deposes and says:

I am a citizen of the United States, a resident of the District of Columbia, and am seventy-one years of age. Since I was sixteen years of age, practically all the time, I have been in the business of paper-hanger and house decorator. Somewhere between 1885 and 1895 I became acquainted with James Hudson, who was a painter. We frequently worked at the same time on houses, he doing the painting work and I the paper-hanging. In this way we got to be more or less friends.

In August, 1897, he had a sort of intelligence office in the Center Market. I happened to go in there one day and he stopped me

and told me that his household effects had been set out on Florida avenue for non-payment of rent or some other cause, and he asked me if I would not take him and his wife out to my house. He seemed to be in very hard luck and without consulting my wife I consented to do so. I do not remember the exact date of this, but think it was sometime in August, it may have been early in September.

About the middle of August of that year, I was employed to superintend repairing and completing a large house belonging to Thomas H. Pickford and John H. Walter situated at Four Corners, Montgomery County, Maryland. Some carpentry work had to be done to complete it. I expected to do the papering when the owners determined what character of work they wanted done.

Meantime I had general charge of the repairs. Said Hudson
60 drove out to said house one day and went over it. He wanted to get a job of painting, but I did not give it to him because we concluded to do that by day's labor. Said Hudson, as I recall, went all over the house and up into a large tower room which was there. There was a lot of old stuff in this room, which I did not examine—jars and cans, shavings and litter of various sorts, that I never looked at particularly. Said Hudson remarked that this stuff ought to be taken out; that there was great danger of fire. I paid no attention to what he said.

As I recall now, the fire occurred one Friday night. When I went home on Saturday the matter was talked of between Hudson and myself, but I did not say anything to him indicating that I knew how the fire had occurred, for I did not know. It broke out when nobody was at the building and seemed to occur first in the tower room, at least, up at the top of the house. Nor did I say anything to said Hudson to indicate or intimate in any way that Pickford or Walter had procured the house to be set on fire, or that I had been instrumental therein.

Some days later said Hudson and his wife were having a quarrel in the house, much to the disgust of my wife. A day or two afterwards Mrs. Hudson stated that she was going to leave and live with her daughter in New York and I hooked up my carriage and sent her to town. After she had gone my wife said to said Hudson that he must leave, which he did, and on foot.

Sometime later I met said Hudson one day in town and
61 he told me that if I would go to Lipscomb's office we could arrange to get a lot of money out of Pickford, meaning the said Thomas H. Pickford, who was one of the owners of the building. I told him that I had been in Washington for a great many years and had never been engaged in any such scheme and would not even consider the matter. I never talked with him again on the subject. Said Hudson evidently did not like to be asked to leave our house, as he was by my wife, nor my refusal to go to Lipscomb's office for the purposes he suggested, and he kept his wrath against me stored up until March, 1901, when he appeared before a grand jury in Rockville and procured me to be indicted for setting fire to said house at Four Corners.

Subsequently, I was arrested in the District of Columbia and

was about to be turned over to the sheriff of Montgomery county to answer the said indictment. But through counsel I resisted arrest and the late Judge Bradley held that the indictment did not charge a crime and I was discharged. Since then I have not heard further from the case. No effort so far as I am aware has ever been made to arrest me, although I have freely and a great many times gone into Montgomery county and rendered myself subject to the jurisdiction of its courts.

GRANVILLE C. SHAW.

Subscribed and sworn to before me this 25th day of March, 1909.

[SEAL.] JOHN P. McMAHON,
Notary Public, D. C.

The words "for I did not know" on page 2 being first interlined.

JOHN P. McMAHON.

62 *Answer of Henry M. Talbott to Amended Bill.*

Filed April 6, 1909.

* * * * * * *

The defendant Henry M. Talbott for answer to the Bill as amended says:

Answering paragraph 4 he says he has no knowledge concerning the averments thereof and can neither admit nor deny the same and if material he requires full proof thereof.

Answering paragraph 6 he says he has no knowledge concerning the alleged conversations between said Lipscomb and said Kilgour and if material requires full proof thereof. He further says that the only reason he did not confer with said Kilgour was that he had no reason to suppose that he had any information upon the subject.

Answering paragraph 8 he denies each and every averment therein and says that never at any time nor in any manner was any agreement arrangement or conspiracy made or entered into between this defendant said Lipscomb and said Hudson or any other person or persons for the purpose set forth in said paragraph and that the question of the indictments therein referred to was submitted by this defendant to the Grand Jury of Montgomery County Maryland solely in the discharge of this defendant's official duty in absolute good faith, and, not otherwise and he expressly denies that he in any wise abused his said office of State's Attorney for
63 his personal ends and gains or for any other purpose.

For answer to the amendment to paragraph 8 he refers to his answer to the original bill.

For answer to the 13th paragraph as amended he refers to his answer to the original bill.

Answering the 14th paragraph as amended he says he has the transfer of said judgment in his possession to be filed whenever necessary.

Answering the 15th paragraph of the Amended Bill he says he reiterates his answer to the original Bill so far as applicable and further answering says he denies that he is insolvent and says that he is the owner of real estate as follows: Part of Square 654 in the City of Washington containing 46000 feet a portion of which is improved by four dwellings and is worth at least $14000 on which there is an encumbrance of $1600 also one fifth interest in land in Fairfax County, Virginia, worth at least $6000 unencumbered.

Houses and lots in Rockville, Maryland worth at least $6000. One half interest in 125 acres in Montgomery County Maryland worth $25000 and subject to an encumbrance of $8000 making this defendant's interest worth not less than $10,000. Also stocks and securities of the value at least $10,000 and he says that his aggregate real and personal property far exceeds all debt due from him.

He reiterates his answer to the original Bill as fully as if herein repeated.

64 Further answering he says that neither in the original Bill nor the amendments thereto have the complainants made or stated any such case as entitles them to any relief and he claims the same benefit of this objection as if raised by demurrer.

And having fully answered he prays to be hence dismissed with his costs.

HENRY M. TALBOTT.

JNO. RIDOUT, *For Def't.*

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof that the facts therein stated upon personal knowledge are true and the facts stated upon information and belief I believe to be true.

HENRY M. TALBOTT.

Subscribed and sworn to before me this 6" day of April 1909.

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN, *Ass't Clk.*

Opinion.

Filed April 20, 1909.

* * * * * * *

In this case a bill is filed to enjoin the defendants from collecting or enforcing a judgment for $8500 recovered in this court in suit at Law No. 45,662, by the defendant Henry M. Talbott against the complainants, for libel.

65 The plea in the case was the general issue "not guilty", and under such pleading the truth of the facts stated in the alleged libel could not properly be inquired into.

It appears from the record that the complainants herein purchased a mansion house in Montgomery County, Md., in 1897. That the same was insured at the time of purchase against loss by fire in the

sum of $35,000. That complainants reduced the insurance to $27,500, and were engaged in making some considerable repairs on the property when it was destroyed by fire. Some question arose between the owners and the insurance companies, because no permission to make the repairs had been given by the companies. Suits resulted, which were compromised, and $22,500 paid in satisfaction of the insurance claim.

The fire occurred September 13, 1897. In March 1901, the complainants and two other parties, were indicted by the grand jury of Montgomery County for arson, charged with burning the said house.

In November 1901, the then State's Attorney for said County, defendant Henry M. Talbott, entered a nolle pros. of the said indictment as against the complainant Pickford; and some time afterward the case was abandoned as to the other defendants.

Apparently smarting under the accusation of crime made by the indictment, and which indictment was founded on the testimony of only one witness, the complainants were instrumental, in either publishing or in circulating, a libelous statement in a Washington paper, in which the State's Attorney, Talbott, was severely
66 criticised, and accused of bad faith in the procuring of said indictment, and of wrongfully using his office to accomplish some personal gain; and for which libel said Talbott brought suit, and recovered judgment in the said sum of $8500.

The bill herein avers that the complainants at the time of the filing of the plea in the libel suit, and at the time of the trial, had no sufficient evidence, and could procure no facts that justified them in pleading the truth of the alleged libelous statements and criticisms of the defendant Talbott.

The said libel suit was carried on appeal to the Court of Appeals, where the judgment was affirmed; and from there by writ of error to the Supreme Court of the United States, where the same was again affirmed; and sometime after the judgment had been affirmed by the Supreme Court of the United States, one of the attorneys who represented the complainants in the litigation discovered by a casual conversation with Judge Henderson of Rockville, that said Talbott had told said Henderson, while the said indictment was pending, that he, Talbott, was anxious to convict the defendants, or at least to keep the case open on the docket; that he represented the insurance companies that had paid the insurance on the property, which they wanted to recover back; and that he, with some one else, had a large fee involved, and that the pendency of the indictment would be of assistance in settling the insurance matter.

On obtaining this information incidentally, and conceiv-
67 ing that it had an important bearing on the statements made in said alleged libel, and might have had sufficient force in connection with the other testimony in the case to have resulted in a verdict for the defendants in the libel suit, counsel have for their clients framed this bill, setting out all the facts, and praying for an injunction to permanently restrain the collection of said judgment as being contrary to equity and good conscience.

A temporary restraining order was granted when the bill was filed.

and answers have been filed by the defendants, and affidavits, on which a motion has been made by the defendant Henry M. Talbott to dissolve the restraining order; and that motion has been argued and submitted to the court.

The only question that seems to be presented at this time, is whether the case made by the bill, answers, and the affidavits, creates such a condition as should require the court to allow a further examination as to the merits of the original controversy.

It is urged by counsel for the defendants that the complainants should have known their case and what pleadings to put in, and what facts to inquire into, before they went to trial in the law case; and that especially should they have known the truth of the facts stated in said libel before publishing or circulating the same; and that it is now too late for them to arrest this judgment and the fruits of that litigation to retry what should have been tried in that action.

On the other hand, counsel for the complainants insist that
68 if it was true that the defendant Talbott had used his office as prosecuting attorney for the purpose of collecting the alleged claim, or for any purpose other than the vindication of the criminal law, it would be unconscionable to allow him to collect the said judgment from men who had in good faith criticised his action in that regard; and that therefore they ought to have a chance to try the issue as to the truth of the facts alleged in said libel, the same not having been tried in the said action at law, without fault or negligence on their part. That they had in good faith, and in the interest of public justice, interested themselves in the said statements so published, believing them to be true; but that their information had been given to their counsel in the said cause, and they had been advised that it was not sufficient to warrant the plea of justification; but had they known of the admission made by the said Talbott when the said indictment was pending, that they have now learned through the statement of Judge Henderson, the plea of justification would have been filed, and all the facts involved in that issue inquired into; and if such had been the case, they believe that no verdict could have been rendered for the plaintiff.

One of the usual grounds for relief through the interposition of a court of equity against the execution of a judgment at law, is that of mistake, surprise, or accident, and where such has occurred without the fault of the party complaining, the court of equity has frequently given the opportunity for a new trial, or a further hearing on the substantial matters which were involved in the
69 suit at law resulting in the judgment, and in such causes it is incumbent upon the complainant to disclose a sufficient excuse for not making his defense in the original action.

If it should appear that the parties seeking such relief had failed to use such a degree of diligence as is requisite in the ordinary business of life, the equity courts usually deny such relief; and it is usually held that all known defenses must be made at the time of the trial of the law suit, as well as all defenses that are capable of being ascertained by reasonable inquiry. This rule is thus

strictly enforced, in order that there may be an end of litigation, and the courts are extremely cautious in granting relief from a judgment on the ground that the party injured was ignorant of the existence of his defense until after the judgment was rendered. The rule has been stated in these words:

"Equity will not relieve a party against a judgment at law on the ground of a defense of which he was ignorant until after the judgment was rendered, unless he shows that, by the exercise of ordinary diligence, he could not discover it, or that he was prevented from employing such diligence by fraud, accident, or the act of the opposite party, unmixed with fault or negligence on his part."

Garrett v. Lynch, 45 Alabama, 211.

There are, however, a number of authorities which hold that whenever a case arises in which a party has an unjust judgment against him, owing to his ignorance of his defense, and the circumstances are such that his ignorance exists without any fault, laches, or want of diligence on his part, he is certainly entitled to relief in equity.

Iglehart v. Lee, 4 Maryland Chancery, 514.

70 If it were true that the defendant Talbott had in any way misused his office through spite, and had through spite, or for any selfish and personal purposes, wrongfully procured an unjust indictment, and such misconduct had been fully made public through the press, he ought not to be allowed, in equity and good conscience, to collect damages for such publication, because it would not be in the interest of good government or according to public policy, to allow him to take advantage of his own wrong.

Notwithstanding the denials in the answers and affidavits, the circumstances of this case seem to me to be such as to fairly require the court to allow complainants to have a further inquiry touching the methods of the district attorney in procuring this indictment, which was alleged to have been without proper foundation. He cannot seriously suffer from such an investigation, if the allegations of the bill in that respect prove to be without foundation, other than the delay in the collection of his judgment.

The judgment is now amply secured by a lien on valuable property, and will be secured by the undertaking furnished in this case, and if such inquiry as the complainants now seek is decided against them, payments of the costs and interest will, in theory at least, fully protect the defendants. But if on an issue being framed as to the truth of the statements made in the said libel, the substantial statements with reference to the misuse of his office are determined against the defendant Talbott, it will be in the interest of honesty and fair dealing for the court to enjoin the collection of the said judgment.

71 The record discloses no actual damage suffered by the plaintiff in the libel suit; and it must therefore be considered that the jury rendered their verdict for such a large amount on the theory of punishing the parties who had without just cause

slandered the said plaintiff; and if it turns out that their statements in the said publication were substantially true, then no foundation whatever could be found for the said verdict, and the judgment should not in that event be enforced.

I think the motion to dissolve the restraining order should be overruled, and I suggest to counsel on both sides, that a speedy and satisfactory way to try the questions herein would be to have this court frame issues and send same to a circuit court for trial by jury; continuing the restraining order, or injunction, until the coming in of the verdict.

JOB BARNARD, *Justice.*

Order Continuing Restraining Order Pendente Lite.

Filed May 4, 1909.

* * * * * * *

This cause coming on to be heard upon the original and amended and supplemental bills, the answers of the defendants thereto, the affidavits filed herein, the motion to dissolve the restraining order heretofore granted, and all other the proceedings herein, the
72 same was argued by counsel for the respective parties and submitted to the Court.

Whereupon, after due consideration thereof, it is this 4th day of May, 1909, by this Court and the authority thereof, adjudged and ordered that said motion to dissolve the restraining order heretofore granted be, and the same is hereby, overruled.

It is further adjudged and ordered that upon the complainants filing herein an undertaking, without surety, as required by Rule 42 of this Court, the defendants, Henry M. Talbott, Thomas M. Talbott, Aulick Palmer, Andrew Lipscomb and Henry F. Woodard, and each of them, and their, and each of their respective attorneys and agents be, and they are hereby, restrained and enjoined until the final hearing of this cause from collecting or enforcing, or attempting to collect or enforce, the judgment in cause No. 45662 on the law dockets of this Court, mentioned and referred to in the proceedings herein, and from asserting the same or the record thereof as a charge or demand upon the complainants herein, or either of them, or the property of either of them.

By the Court:

JOB BARNARD, *Justice.*

73 *Disclaimer of Thomas M. Talbott.*

Filed September 22, 1909.

* * * * * * *

The disclaimer of the defendant Thomas M. Talbott respectfully represents as follows:

This defendant says that prior to the filing of the Bill in this

cause he had re-assigned and re-transferred all his interest in the Judgment referred to in the Bill to defendant Henry M. Talbott and at the time when said Bill was filed he had not nor has he now any interest in said Judgment.

Wherefore this defendant, being advised that no further answer is required from him prays to be hence dismissed with his costs.

THOMAS M. TALBOTT.

Answer of Andrew A. Lipscomb.

Filed Oct. 19, 1909.

* * * * * * *

The defendant, Andrew A. Lipscomb hereby renewing his demurrer heretofore filed to the original bill and insisting that the said demurrer applies with equal force to the amended bill and especially asserting and reserving all rights under the demurrer as if herein again set forth nevertheless in conformity to the rules and established practice of this Court for answer to such part or parts of the said bill and amended bill as charge this defendant with
74 fraud or conspiracy with the said defendant, Henry M. Talbott, James M. Hudson or any other person or persons says as follows:

This defendant says that the statements of the said Kilgour as alleged in the sixth paragraph of the amended bill are absolutely and unqualifiedly false in so far as they set forth any employment by the insurance companies, any offer of a disposition or division of fees between the said Kilgour and the said defendant, Lipscomb, or any offer from the insurance companies to the said Lipscomb of the proceeds of suits for the recovery of money theretofore paid by the said Companies to the said Pickford or Walter; defendant further says that he never in his life had but the one conversation with the said Kilgour in relation to this matter and that in his Lipscomb's office related solely to the fact that a client of his, Lipscomb, had knowledge of the commission of a crime in his Kilgour's jurisdiction and that he desired to secure immunity for his, Lipscomb's client in order that the public interests might be protected and at the same time his, Lipscomb's, client's interests subserved; that this defendant never did represent the said insurance companies, never heard of an offer from them to pay a fee of any kind for the recovery of the money paid to Pickford and Walter; did not know the defendant Talbott at the time of the alleged interview never in fact at that time attempted to conspire with the said Kilgour by making him any offer whatsoever or subsequently did not attempt to conspire with the said Talbott with reference to the same transaction and finally this defendant says that the statements of the said Kilgour are not only false, respect for the court saves
75 the branding with a shorter and uglier word, but the defendant says that the said Kilgour knows them to be untrue; defendant says that the interview to which he here refers oc-

curred twelve or thirteen years ago at his, Lipscomb's office in this city and District.

This defendant further says that in this his answer he denies as untrue every statement of the said Kilgour except as above set forth by himself and asks that the said denial be considered as if specifically made to each of the statements seriatim made in the said paragraph.

Answering the eighth paragraph of the said bill this defendant says that he did not conspire with the said Henry M. Talbott, or the said James Hudson to procure the indictment against the said Pickford and others, that he denies the allegations contained in said paragraph, brands them each and every one as false and says further that in fact he never spoke to the said Talbott until after the indictment of the said Pickford and others on this or any other subject and in fact first spoke to Talbott, when in 1901, he was defending his client Hudson in the Police Court on a charge of conspiracy to defraud Pickford, for which Hudson recovered a judgment for malicious prosecution against the said Pickford.

ANDREW A. LIPSCOMB.

F. EDWARD MITCHELL,
Attorney for Defendant.

I do solemnly swear that I have read the foregoing answer by me subscribed and know the contents thereof and that the facts therein stated of my own knowledge are true and those
76 stated upon information and belief I believe to be true.

ANDREW A. LIPSCOMB.

Subscribed and sworn to before me this 19th day of October, 1909.

EMORY H. BOGLEY,
[SEAL.] *Notary Public, D. C.*

77 *Testimony for Complainants.*

Filed Oct. 26, 1909.

* * * * * * *

WASHINGTON, D. C., *October* 19, 1909—3 o'clock, p.m.

Met pursuant to notice at the office of Maddox & Gatley, Washington, D. C.

Present on behalf of the Complainant Pickford, Mr. Maddox.

Present on behalf of the Complainant Walter, Mr. Davis.

Present on behalf of the Defendant Henry Maurice Talbott, Mr. Ridout.

Present on behalf of the Defendant Lipscomb, and of himself as intervenor, Mr. F. Edward Mitchell.

Present on behalf of himself, as intervenor, Mr. William Ellison.

Mr. DAVIS: In the order of proof determined upon, it was the purpose of counsel for the complainants first to offer a certified copy

of the Rockville indictment mentioned in the bill of complaint and the docket entries of the Circuit Court of Montgomery County in relation thereto, but owing to the inability of counsel to obtain the necessary certification of the same, by reason of the absence
78 from Rockville of a justice of that court, the same are not in form to be offered at this session. Formal offer of them, however, is now and here made, with the understanding that when obtained duly certified they will be offered and filed.

Counsel for the complainants now offer in evidence the record and proceedings in cases numbered 298, 299 and 300 habeas corpus, in the Supreme Court of the District of Columbia, being the cases of Aaron Bradshaw, Granville C. Shaw and John H. Walter.

Counsel for the complainants also offer in evidence a certified copy of the petition for writ of habeas corpus in the case of Walter, being number 300, and the proceedings therein, and the same is filed herewith, marked "Exhibit A," and is in the words and figures following to wit:

EXHIBIT A.

Petition for Writ of Habeas Corpus.

Filed April 16, 1901. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Habeas Corpus. No. 300.

In the Matter of the Petition of JOHN H. WALTER.

To the Supreme Court of the District of Columbia, holding a United States Court:

The petition of John H. Walter respectfully shows:

1. That he is a citizen of the United States and a resident
79 of the District of Columbia.

2. That he is unlawfully restrained of his liberty by Arthur Williams, Esq., Sheriff of the County of Montgomery of the State of Maryland, and party named as the agent to receive—on behalf of the State of Maryland, this petitioner in a requisition hereinafter named and described; and that the said restraint of petitioner is illegal; first, because the only pretext or cause therefor is a certain order passed by the Honorable Edward F. Bingham, Chief Justice of the Supreme Court of the District of Columbia, delivering up the petitioner to the said Williams, Sheriff and agent as aforesaid, upon a request of the Honorable John Walter Smith, Governor of the State of Maryland, that the petitioner be delivered up to the said Arthur Williams, sheriff and agent as aforesaid, to answer a certain indictment alleged to have been found and returned by the grand jurors of said County; the said request of the said John Walter Smith, Governor as aforesaid, alleging and charging that the petitioner is a fugitive from justice of the said State of Maryland;

whereas this petitioner upon oath says that he is not a fugitive from justice of the said State of Maryland; and has not at any time fled from said State, and was not within the said State of Maryland, at the alleged time of the alleged commission of the alleged offense sought to be charged in the said indictment and request for rendition mentioned. Second, because the copy of the indictment upon which said requisition is based does not charge this petitioner
80 with any crime against the laws of the said State of Maryland. Third, because the said copy of said indictment is not certified as authentic by the Governor of the said State of Maryland.

3. For the reasons alleged in the second paragraph of this petition the petitioner is advised by counsel learned in the law, and so believes, that the said restraint is illegal.

Wherefore the petitioner prays that a writ of habeas corpus may be granted, directed to the said Williams, Sheriff and agent as aforesaid, commanding him to have the body of the petitioner before your Honorable Court at a time and place therein to be specified to do and receive what shall then and there be considered by the Court concerning him, together with the time and cause of his detention and said writ; and that the petitioner may be restored to his liberty.

JNO. H. WALTER.

DISTRICT OF COLUMBIA, *ss:*

Before me personally appeared John H. Walter who, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him, and that he has read the same and knows the contents thereof, and that the statements therein made of his own knowledge are true and those made on his information and belief he believes to be true.

JNO. H. WALTER.

81 Subscribed and sworn to by me this 16th day of April A. D. 1901.

C. CLINTON JAMES,
[SEAL.] *Notary Public, D. C.*

(Indorsed.)

Let Writ issue as prayed returnable 3 P. M. April 16, 1901.
JOB BARNARD, *Justice.*

Filed in Open Court, April 16, 1901. J. R. Young, Clerk.

Writ of Habeas Corpus.

Issued April 16, 1901.

DISTRICT OF COLUMBIA, *To wit:*

The President of the United States to Arthur Williams, Greeting:

You are hereby commanded to have the body of John H. Walter, detained under your custody, as it is said, together with the day

and cause of his being taken and detained, by whatever name he may be called in the same, before the Honorable Job Barnard, one of the Justices of the Supreme Court of the said District, at the United States Court House, Washington City, (on the 16th day of April, 1901, at 3 o'clock P. M.) after the receipt of this writ, to do and receive whatever shall then and there be considered of in this behalf; and have then there this writ.

82 Witness, E. F. Bingham, Chief Justice of said Supreme Court, the 16th day of Ap'l, 1901.

J. R. YOUNG, *Clerk*.

[SEAL.] By F. W. SMITH,
Ass't Clerk.

Marshal's Return.

Served copy of within Writ on Arthur Williams personally, April 16, 1901.

AULICK PALMER,
U. S. Marshal.

L.

Recognizance for Appearance of Petitioner.

In the Supreme Court of the District of Columbia, Holding a Criminal Court.

No. 300. Habeas Corpus.

In re JOHN H. WALTER.

The petitioner and Henry S. Walter his surety, acknowledge themselves indebted to the United States in the sum of Three thousand ($3000) dollars, to be levied of their and each of their lands and tenements, goods and chattels, if the said petitioner fail to appear before this Court on Friday, April 19, 1901, at 1 o'clock, p. m. and from day to day at the present and subsequent terms thereof, and abide the decision of the Court herein or if the

83 said petitioner depart the Court without leave.

Acknowledged in Open Court before me,

JOHN R. YOUNG, *Clerk*.
By F. W. SMITH,
Assistant Clerk.

Surety examined and approved by

JUSTICE BARNARD.

Amendment to Original Petition.

Filed April 29, 1901. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Habeas Corpus. No. 300.

In the Matter of JOHN H. WALTER, Petitioner.

To the Supreme Court of the District of Columbia, holding a United States Court:

Your petitioner, by leave of the Court first had and obtained, amends his original petition, heretofore filed herein, by adding to paragraph two thereof, and at the end of said paragraph the following:

Your petitioner further states that before the said order of the said Honorable Edward F. Bingham, Chief Justice as aforesaid, was by him passed, and at a hearing upon said requisition, he tendered himself as a witness upon the question whether or not he was a fugitive from justice in the matter thereof; and, being permitted to testify by said Chief Justice, and having been duly sworn,
84 did testify that he was not in the State of Maryland at the time of the alleged commission of the alleged offense, nor had he been in said State for some time, to wit, for more than forty-eight hours prior to the burning of the dwelling house for the destruction of which he is, as aforesaid, alleged to have been indicted, that since the burning of said house he has continued to reside openly in the District of Columbia, which was his home prior to the burning thereof, that frequently since said burning he has openly gone into the State of Maryland, and conversed with officials of said State, and other citizens thereof, and that he had never fled from said State for any purpose, nor was he or is he a fugitive from the justice thereof.

The petitioner further shows that at the hearing before the said Honorable Edward F. Bingham, aforesaid, Arthur Williams, sheriff, as aforesaid, after being duly sworn, testified that he had no knowledge that this petitioner, or the certain Bradshaw, or the certain Shaw, in the said requisition mentioned, was in the State of Maryland at or about the time of the alleged offense, for which, as is alleged, this petitioner was indicted, and that he, the said Williams, had made the affidavit accompanying the said requisition at the request and upon the information of H. Maurice Talbott, State's Attorney for the County of Montgomery, State of Maryland, and the said Talbott, after being duly sworn, testified that he had no personal knowledge that the petitioner, or the said Bradshaw, or the said Shaw was in the State of Maryland at the time aforesaid, and had no knowledge in relation thereto except such as he had
85 derived in the discharge of his official duties as State's Attorney as aforesaid; the nature and extent of which said

alleged information, if any such he had, the said Talbott declined to disclose; and each of the said Williams and the said Talbott further testified that he did not know that either this petitioner, or the said Bradshaw, or the said Shaw was a fugitive from justice from the said State of Maryland; and the aforegoing was substantially all the testimony, evidence, or showing upon which the said Chief Justice acted or which was had at the time of the making of said order aforesaid.

JNO. H. WALTER.

DISTRICT OF COLUMBIA, *ss:*

Before me personally appeared John H. Walter, who, being duly sworn, deposes and says that he is the petitioner named in the foregoing amendment to the original petition, subscribed by him, and that he has read the same and knows the contents thereof, and that the statements therein made of his own knowledge are true and those made on his information and belief he believes to be true.

JNO. H. WALTER.

Subscribed and sworn to by me this 29th day of April A. D. 1901.

J. R. YOUNG, *Clerk.*
By J. WILMER LATIMER,
Ass't Clerk.

86 *Return of Respondent.*

Filed April 29, 1901. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Habeas Corpus. No. 300.

In re JOHN H. WALTER.

To the Honorable Job Barnard, one of the Justices of the Supreme Court of the District of Columbia:

For return to the Writ of Habeas Corpus to me directed hereto attached, I respectfully state:

1. That at the time of the service of the said writ upon me, I held the said John H. Walter in my custody, to be conveyed to the said State of Maryland, by virtue of an order of the Honorable Edward F. Bingham, Chief Justice of the Supreme Court of the District of Columbia passed on the 16th day of April A. D. 1901, a copy of which order is hereto attached and made part of this return, and that the said John H. Walter has been admitted to bail pending the proceedings, for which reason I cannot produce the body of the said John H. Walter before the Court.

2. That the circumstances under which said order committing the said John H. Walter to my custody was passed were as follows:

On the 8th day of April A. D. 1901, the Honorable John Walter Smith, Governor of the State of Maryland, made application in writing in the form of a requisition to the said, the Honorable Edward F. Bingham, Chief Justice as aforesaid, for the apprehension and delivery to this respondent of the petitioner John H. Walter, as a fugitive from justice of said State, who has taken refuge in said District of Columbia; that the said requisition was with its accompanying papers filed in the Clerk's office of the Supreme Court of the District of Columbia on April 13 A. D. 1901 and this respondent prays that the same may be referred to, and taken and considered as a part of this return; that the said requisition was presented to the said, the Honorable Edward F. Bingham, Chief Justice as aforesaid, and thereupon he issued a warrant for the apprehension of the petitioner, and the said petitioner was apprehended and brought before him, whereupon, upon consideration of the said requisition and upon consideration of the testimony of Aaron Bradshaw, Granville C. Shaw and H. Maurice Talbott, witnesses then and there adduced orally before him the said Honorable Edward F. Bingham, Chief Justice as aforesaid, as to the identity of the said John H. Walter, and as to whether or not the said John H. Walter was a fugitive from justice, the said order for the delivery of the said John H. Walter to this respondent to be conveyed to the State of Maryland, was by him the said Chief passed.

87

ARTHUR WILLIAMS.

Arthur Williams being by me duly sworn this 29th day of April A. D. 1901, states that the foregoing return by him subscribed is true as he verily believes.

J. R. YOUNG, *Clerk, &c.*,
[SEAL.] By R. J. MEIGS, *Ass't Clerk.*

88

Copy.

Writ of Habeas Corpus.

Issued April 16, 1901.

DISTRICT OF COLUMBIA, *To wit:*

The President of the United States to Arthur Williams, Greeting:

You are hereby commanded to have the body of John H. Walter, detained under your custody, as it is said, together with the day and cause of his being taken and detained, by whatever name he may be called in the same, before the Honorable Job Barnard, one of the Justices of the Supreme Court of the said District, at the United States Court House, Washington City, (on the 16th day of April, 1901, at 3 o'clock P. M.) after the receipt of this writ, to do and receive whatever shall then and there be considered of in this behalf, and have then there this writ.

Witness, E. F. Bingham, Chief Justice of said Supreme Court, the 16th day of Ap'l 1901.

J. R. YOUNG, *Clerk*,
[SEAL.] By F. W. SMITH, *Ass't Clerk.*

89 *Order to Surrender the Prisoner.*

Filed April 29, 1901. J. R. Young, Clerk.

Before the Chief Justice of the Supreme Court of the District of Columbia.

No. 262. Req. Doc.

In re THE STATE OF MARYLAND
vs.
GRANVILLE C. SHAW, AARON BRADSHAW and JOHN H. WALTER.

The Governor of the State of Maryland having made his demand for the persons of said defendants, and said defendants having been arrested and brought before me by the United States Marshal for said District, upon warrant issued herein by virtue of the authority vested in the Chief Justice of the said Court by act of Congress, and being satisfied, after a hearing duly had, that the prisoners are the identical persons mentioned in said requisition, it is therefore, the 16th day of April 1901, ordered that the said Granville C. Shaw, Aaron Bradshaw and John H. Walter be surrendered to Arthur Williams, the Agent of said State, by him to be conveyed to the County of Montgomery, in said State, there to answer the charge of Statutory Burning, set forth in said requisition.

E. F. BINGHAM,
Chief Justice of the Supreme Court, D. C.

(Indorsed:) Filed in Open Court Apr. 16, 1901, J. R. Young, Clerk. Hab. Corp. Min. p. 161.

90 *Decree Discharging Petitioner.*

Filed April 30, 1901. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

No. 300.

In the Matter of the Petition of JOHN H. WALTER, Habeas Corpus.

Upon consideration of the petition as amended in the above entitled cause, and the return thereto, and after argument by counsel and consideration by the Court, it is this 30th day of April, A. D., 1901, adjudged and ordered that the petitioner be, and he hereby is, discharged from custody as prayed.

A. C. BRADLEY, *Justice.*

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing to be a true and correct transcript of the record in the Matter of the Petition of John H. Walter, Habeas Corpus No. 300, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and
91 affix the seal of said Court, at the City of Washington, in said District, this 12th day of October, A. D. 1909.

(Signed) JOHN R. YOUNG, *Clerk.*

Counsel for the complainants also offer in evidence the opinion of Mr. Justice Bradley, filed April 29, 1901, entitled in the said three cases, and the same is filed herewith, marked "Exhibit B", and is in the words and figures following to wit:

Opinion.

Filed April 29, 1909. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

Habeas Corpus. Nos. 298, 299 and 300.

In re AARON BRADSHAW et al.

The petitioners allege that they are unlawfully restrained of their liberty by Arthur Williams, sheriff of the county of Montgomery, State of Maryland, and agent of said State in extradition proceedings, to whom they have been surrendered by the chief justice of this court. By his return in the several cases, the respondent admits that he had custody of the petitioners, respectively, under the order of the chief justice for the purpose of taking them to the
92 State of Maryland for trial under an indictment, a copy of which is attached to the requisition of the Governor of the State of Maryland, which requisition and accompanying papers are referred to and made part of each return, but that the bodies of the petitioners are not produced because the petitioners had been admitted to bail.

The writ in each case was directed to be issued by Justice Barnard, and the several cases have been referred by him to me for hearing.

Several interesting questions were argued at the hearing, but in the view that I have taken of the main question, namely the sufficiency of the indictment, it will be unnecessary for me to determine the others.

In behalf of the petitioners, it is claimed that the act, with the

commission of which they are charged by the indictment, is not a criminal offense either at common law, or under the Statutes of Maryland.

The indictment is as follows:

"STATE OF MARYLAND,
Montgomery County, To wit:

"In the Circuit Court for Montgomery County.

"The grand jurors of the State of Maryland, for the body of Montgomery County, upon their oaths and affirmations present, that Granville C. Shaw, Aaron Bradshaw, Thomas H. Pickford and John H. Walter, late of said county, on the eleventh day of September, in the year of our Lord, eighteen hundred and ninety-seven, at the county aforesaid, a certain untenanted dwelling house, of the
93 property of the said Thomas H. Pickford and John H. Walter, there situate, unlawfully, wilfully, and maliciously did set fire to, and the same house, then and there, by such firing as aforesaid, unlawfully, wilfully and maliciously did burn and consume, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State."

Signed by the State's attorney, and indorsed "a true bill" by the foreman of the Grand Jury.

The indictment charges the four defendants named in it with unlawfully, wilfully and maliciously setting fire to and burning an untenanted dwelling house, the property of two of them.

Clearly this is not common law arson. Arson at common law is the wilful and malicious burning of the dwelling house of another. Two of the essential elements of the crime are occupancy and the ownership in another, either general or special. It is an offense against the security of the habitation, and punishable severely for the protection of the occupants, rather than the protection of the property. It is not arson to set fire to and burn an untenanted dwelling house. *Elsmore* v. *Inhabitants*, 8 B. & C. 461; *State* v. *McGowan*, 20 Conn. 245; *Stallings* v. *State*, 47 Ga. 572.

Inasmuch as an owner of a dwelling house has the right to destroy it by burning, if it pleases him so to do, such act, if done to the prejudice of no other person, would be no offense, and if done with intent to injure another, or to the prejudice of another, would yet not be arson. *Spalding's Case*, 2 East P. C. 1025; *State*
94 v. *Haynes*, 66 Me. 307; *State* v. *Keena*, 63 Conn. 329; *People* v. *De Winton*, 113 Col. 403.

If the alleged owners of the house burned, Pickford and Walter, did not commit arson in destroying their own property, their co-defendants, Shaw and Bradshaw, in co-operating with them, acted with their consent, and are equally innocent of that crime. *State* v. *Haynes*, supra: *Roberts* v. *State*, 7 Colo. 359.

If it be an offense under the laws of Maryland for one to burn his own dwelling with the intent to injure another, such intent is

an essential element of the crime, and the indictment must allege such intent, and identify the person towards whom the intent was directed. This indictment does not attempt to charge such an offense, and my attention has not been directed to such a statute. It purports to be drawn under a statute, and section 7 of article 1, volume 1, Code of Maryland, is referred to as the statute upon which it is based. That section is under the general caption, "Arson and Burning," and it reads:

"If any person shall maliciously set fire to and burn any untenanted dwelling house, he shall, on conviction thereof, be confined in the penitentiary for a term of not less than two years, nor more than ten years."

It imposes the penalty of imprisonment in the penitentiary for not less than two or more — ten years for the malicious burning by any person of any untenanted dwelling house. It is broad enough to cover the case of burning by the owner of his untenanted
95 house; but is it susceptible of such judicial construction?

Section 6, immediately preceding, provides that:

"Any person convicted of the crime of arson, or as being accessory thereto, shall at the discretion of the court suffer death, or be sentenced to the penitentiary for not less than five nor more than twenty years."

For the definition of the crime of arson resort must be had to the common law, and so defined, the act of an owner in burning his dwelling house, although occupied by his own family, and the act of any one in maliciously burning an untenanted dwelling house would not be punishable under this section.

If the legislative intent in section 7 had been to punish one for maliciously burning his own property, inasmuch as such act at common law was within his right, provided he did not injure another thereby, it should and doubtless would have been expressed in plain and unambiguous language. In the absence of such plain expression, it must be assumed that the intent was to merely make punishable under this section the act of maliciously burning the *untenanted* dwelling house of another, which, not being arson at common law, would not be covered by section 6.

But if light upon legislative intent is needed, it may be found in later sections, 11, 12 and 13, under the same head, which are as follows:

"Sec. 11. If any person shall maliciously set on fire any fence, or fencing, or any straw, stack or stacks, or ricks of straw, or any hay or mowed grass, or other grass, or any tobacco, he shall on conviction thereof, be sentenced to the penitentiary for not less than two or more than ten years.

"Sec. 12. Every person, his aiders and abettors or counsellors, who shall be convicted of the crime of wilfully burning any
96 mill, distillery, manufactory, barn, meat house, tobacco house, stable, warehouse, or other outhouse, not parcel of any dwelling house, being empty, or having therein any tobacco, wheat, rye, oats, Indian corn, barley, flax, hemp, hay, or other country produce, horse or horses, cattle, or goods, wares and mer-

chandise, or of burning any stack, rick, mow or barrack of hay, fodder, flax, hemp, tan bark, wheat, or other grain, shall at the discretion of the court suffer death, or be sentenced to the penitentiary for not less than three, nor more than twelve years.

"SEC. 13. Any person who shall maliciously and wilfully attempt to burn any dwelling house, whether inhabited or not, or any mill, factory, barn, stable, storehouse, or other outhouse, or any stack of grain, hay, straw or fodder, upon conviction thereof shall be sentenced to the penitentiary for not less than eighteen months nor more than ten years."

The word "any" as applied to persons, is evidently used in the same sense in sections 6, 7, 11 and 13, and is intended to have the same scope as the word "every" in section 13. But in section 6, "any person" can not be held to include the owner, for that relates to the crime of arson. It is equally manifest that the same words in sections 11 and 13, and the words, "every person" in section 12, mean, any or every person, other than the owner, otherwise an owner who maliciously sets fire to any of his fencing, hay, grass or tobacco, or who wilfully burns his outhouses, meathouse, rick of hay, or stack of fodder, or who maliciously and wilfully *attempts* to burn his outhouse, rick of hay, or stack of fodder, may be subjected to a long term of imprisonment in the penitentiary, and for burning his outhouse, meathouse, rick of hay, or stack of fodder, he may, in the discretion of the court, be subjected to capital punishment.

Under section 6, he can not be punished for burning his
97 own tenanted dwelling house, occupied by his own family, but under section 13 he may be imprisoned in the penitentiary for ten years for making an unsuccessful attempt to burn it, and if untenanted he may suffer like term of imprisonment under section 7 for burning it, or under section 13 for the attempt to burn.

Such an interpretation of sections 11, 12 and 13, would be manifestly unreasonable, and it cannot be seriously contended that such was the legislative intent, and with that conclusion it necessarily follows that the words "any person" in section 7 do not include the owner.

Inasmuch as the courts of the State do not appear to have given the statute the construction contended for, I am constrained to follow my own construction, and so following, to hold that the act alleged in the indictment is not punishable under the statute named: that it appears to be no crime, and that the petitioners are entitled to be discharged.

ANDREW C. BRADLEY,
Associate Justice.

Mr. RIDOUT: On behalf of the defendant, H. Maurice Talbott, these papers are objected to on the ground, first, that under the record as it exists, this Court is without jurisdiction or authority to enter upon the consideration of testimony of such a character; and on the further ground that, in any event, these papers are ir-

relevant and immaterial to the issues, if any appropriate
98 issues exist in this cause.

Mr. MITCHELL: These objections are concurred in by counsel for Mr. Lipscomb and the other parties defendant represented.

Mr. RIDOUT: Counsel who have objected give notice that, at the proper time, they will move to suppress all testimony of this nature, and having given this notice, will refrain from useless repetition of it.

Mr. MITCHELL: I might also add, in order to save time, that counsel for the defendant Lipscomb, and the other defendants, are hereby understood to concur in all objections made on behalf of the defendant Henry Maurice Talbott, unless the contrary is expressed.

Mr. DAVIS: Counsel for the complainants now offer in evidence extracts from the deposition of the defendant, Henry Maurice Talbott, in the case of Henry Maurice Talbott vs. Thomas H. Pickford and John H. Walter, at law #45,662, in the Supreme Court of the District of Columbia; and also extracts from the deposition of the said Talbott in the case of the United States vs. Ferdinand Hopp and James C. Hudson, prosecution for conspiracy and blackmail in the Police Court of the District of Columbia, which extracts have been submitted to counsel for the said Talbott, and are agreed to be true extracts as imported, the necessity of producing the stenographer who took and transcribed the depositions from which the extracts are taken being, by consent of counsel, waived.

Mr. RIDOUT: These extracts from depositions are objected to on behalf of the defendant Talbott on the grounds already
99 stated in connection with the first offer, and on the further ground that the Court is without authority to retry this case, this particular phase of the testimony having been adequately dealt with already in the proceedings at law, and *have* been conclusively adjudicated against the contentions of the complainants in this case.

Counsel for the said defendant Talbott has conceded the accuracy of these extracts and waives the production of the stenographer, with the understanding that a like use may be made of the stenographic reports by them, so far as they may be advised.

Mr. DAVIS: To which counsel for the complainants assent.

Mr. MITCHELL: Counsel for the defendant Lipscomb, not having been served with notice of the extracts, does not join in this acceptance by counsel for the defendant Talbott, but reserves the right to examine the same and accept or reject as the interests of his client may make it advisable.

The above-mentioned extracts are offered in evidence, marked "Complainants' Exhibit- C and D", and the same are in the words and figures following to wit:

EXHIBIT C.

In the Supreme Court of the District of Columbia.

At Law. No. 45662.

HENRY MAURICE TALBOTT
vs.
THOMAS H. PICKFORD and JOHN H. WALTER.

100 *Extracts from Deposition of Mr. Talbott.*

Cross-examination.

By Mr. MADDOX:

Q. When were you elected State's Attorney for Montgomery County? A. I think I was elected in 1899.

Q. When did you assume the duties of your office? A. The first Monday in January, 1900.

Q. What were your duties as State's Attorney, in the matter of the presentation of cases to the grand jury? A. I do not just know what you mean, Mr. Maddox. The duty of a State's Attorney, in our counties, is different from those of prosecuting attorneys here. If you want it broadly stated I can give it to you.

Q. I want it broadly stated. A. Really a State's Attorney acts as what you might call a chief of police, and advising officer to the sheriff, and he sees that all criminal affairs of the county are properly conducted. He investigates crime. I do not mean by that that every little misdemeanor is investigated by the State's Attorney, because that (28) would be impossible; but any serious crime the State's Attorney is supposed to personally investigate. He has the right to call on the sheriff and all his deputies, and, to a certain extent, to employ detectives to assist him. So that his duties are not confined like the duties of a prosecuting officer here. His duties are broader.

101 Q. What I want to get at is this, broadly——. A. That is the difficulty. I could not understand your question.

Q. In case an infraction of the law is brought to the attention of the State's Attorney for Montgomery County, he investigates it himself, and it is his duty to investigate it before he presents it to the grand jury? A. As to that, to a considerable extent, it depends upon the crime. For example, these misdemeanors are constantly occurring, and the State's Attorney is not supposed to investigate every little misdemeanor. But if, in his opinion, a crime is of such character as to require investigation by the State's Attorney he does it. Some State's Attorneys would investigate a crime where others would not. That is a matter of opinion.

Q. You investigated this crime for which the defendants here, Thomas H. Pickford and John H. Walter, were indicted in your county? A. I did.

Q. Before presenting it to the grand jury? A. That is right.

Q. Who first brought it to your attention? A. The first notice I had of that was a letter from (29) an old gentleman here in Washington by the name of Thompson. It was rather a vague and indefinite letter, in which the crime itself was not set out, which said that a serious crime had been committed in Montgomery County and that he would like to confer with me about it. The
102 letter was very vague. I was very busy, and did not immediately go to see Mr. Thompson. Shortly afterwards I received another letter somewhat more in detail, stating the crime, and that it was the crime of arson.

Q. Have you those letters? A. No sir; I have not.

Q. Where are they? A. I do not know where they are. It has been years ago and I have no idea where they are.

Q. Did you know at the time that the matter had been brought to the attention of your predecessor in office? A. No sir, I did not.

Q. Who was your predecessor? A. Mr. Kilgour.

Q. Did he not tell you that it had been brought to his attention? A. Long afterwards.

Q. It was a matter that had occurred during his incumbency of the office? A. Yes, that is right.

Q. You took this matter up, did you? A. Yes; and Kilgour did not know anything about that at that time, and nobody else did.

Q. Did you enquire about it from Mr. Kilgour (30) A. No, I said nothing to Mr. Kilgour about it.

Q. You did not say anything to him? A. Not a word.

Q. You assumed that it had escaped his attention? A.
103 I did not assume anything about it. It just did not occur to me to talk with Mr. Kilgour, and, as a matter of fact, I did not talk with him.

Q. Did you ask Mr. Thompson whether or not the matter had been brought to the attention of Mr. Kilgour? A. I am not sure about that, and I do not know. I am not at all sure whether I did or not.

Q. Go ahead and tell what happened after you received these letters from Thompson? A. Sometime after receiving either the second or third letter from Thompson I called on Mr. Thompson on Ninth or Tenth street, somewhere along about there, just above F street, and he began——

Q. Did you, at that time, yourself know about this fire? A. Yes.

Q. You had heard about it, had you? A. Everybody in the county knew of the fire.

Q. They knew about this fire? A. Yes; certainly.

Q. Everybody in the county knew of it? A. Yes; I suppose so. It was a matter of general notoriety.

Q. Except possibly Mr. Kilgour? A. I have no doubt that Mr. Kilgour knew of it; I (31) have no doubt in the world that he knew about it. I assume so.

104 Q. When did the fire occur? A. It occurred in 1897.

Q. In September, 1897? A. I think so.

Q. Two and a half years before you qualified? A. I qualified on the first Monday of January, 1900.

Q. This fire occurred two and a half years before you qualified? A. No; not two and a half years. It was two years from September.

Q. You called on Mr. Thompson? A. Yes; I called on Mr. Thompson.

Q. Where did you see him? A. Either on Ninth or Tenth street, somewhere along there, just above F street.

Q. Who was he. A. He was a newspaper man.

Q. Had you ever seen him before? A. No, I never had seen him before. He represented himself to be the editor and proprietor of the Washington Chronicle.

Q. Not of the Globe? A. No, not of the Globe. He started in telling me about this arson that had been committed in Montgomery County. I said: "Oh yes, that is a charge very easily made, Mr. Thompson, but I cannot take any cognizance of that at all until I can get some evidence". Then he told me— (32) do you want to hear the whole story?

105 Q. No; get along to the evidence. A. Then I did not go to see Mr. Hudson that night.

Q. He told you that Mr. Hudson would be a witness? A. Yes.

Q. Did he tell you who Hudson was? A. No, sir.

Q. He just told you that a man named Hudson would be a witness; did he? A. No; not in that sense. He told me that Hudson knew all about it, knew who had burned the property, and knew under what circumstances the property was burned, and knew of the insurance which was effected with Shaw and Bradshaw, and, in fact, was thoroughly in touch with the situation. That is what Thompson told me. I said, "Very well, we will interview Mr. Hudson." For some reason, I am not sure about what it was, we did not interview him that night.

Q. To whom do you refer by "we"? A. To Thompson and myself. Then an arrangement was made by which we would interview Mr. Hudson. I took a stenographer along with me and we went to see Mr. Hudson. Thompson was with me. They were both strangers to me. (33).

Q. Mr. Talbott, you were present in the police court, were you not? A. I was.

Q. At the trial of Hudson and Hopp, for blackmailing and conspiracy? A. Well, it was an ex-parte hearing.

106 Q. But it was a hearing? A. Yes.

Q. You were there? A. Yes, sir.

Q. Mr. Pickford was there? A. I think so. Yes; I know he was there.

Q. Did you testify in that case, in Mr. Pickford's hearing, that before this presentment of him to the grand jury you had never known Hudson? A. I could not have done that because——

Q. And that the time he appeared as a witness was the first time

you ever knew him? A. I never knew him until Thompson and myself went down there.

Q. Did you testify in that case, in Pickford's hearing, that before this presentment of him to the grand jury you had never known Hudson? A. I could not have done it.

Q. And that you had not known him more than a few days or weeks? A. No; I could not have done that because, as a matter of fact, I had known him from the early fall of that year—possibly three or four or five months—something like that.

Q. Then this conversation with Thompson and Hudson occurred in the fall, did it? A. I think it was in the early fall.

Q. In what year? A. Of 1900.

Q. That was before you were inducted into office? A.
107 No; I went in the first of January, 1900.

Q. Did you testify, in the hearing of Mr. Pickford, that you had given Hudson a check for $75? A. No, I did not. I testified that I had sent my brother-in-law, Mr. Jesse H. Wilson, for Mr. Hudson, a (40) check for $75, to take up a chattel mortgage that the old man had on his printing plant. He put up a pitiful plea to me to help him, saying that his sole means of livelihood was to be sold out under the chattel mortgage. It had no connection with this case on the face of the earth. As a matter of fact to me, he made a secret organization appeal to me, which did appeal to me very strongly, that I should relieve him of the necessity of being turned out of doors in his old age, because as he said, he could barely make a living with this printing place. He wanted to know if I would not take up that chattel mortgage, and I told him I thought I possibly would do it. I wrote a letter to Mr. Wilson, stating that Mr. Wilson——

By Mr. LIPSCOMB:

Q. Who is Mr. Wilson? A. He was Jesse H. Wilson. I sent him a check and stated to him——

By Mr. MADDOX:

Q. You testified to that in the police court? A. Yes sir.

Q. That was while you were using Mr. Hudson as a witness? A. No, I was not using him at all.

Q. It was after you had procured the indictment? A.
108 No; I think it was considerably before that. That is my recollection.

Q. That was after Thompson had introduced Hudson to you? A. Of course, because that was the first time I ever knew Hudson. (41)

Q. And before the indictment? A. I think so.

Q. Then at that time you depended on Hudson as the witness to make that indictment? A. I was not interested in that case any more than I was in hundreds of others. I had absolutely no interest in it, and I was not, in that sense, dependent on Hudson at all. He was simply a witness in the case like any other.

Q. I did not ask you that question. A. Well, you used the words "dependent upon him."

Q. I ask you if, at that time, you depended upon Hudson as a witness to make that indictment?

Mr. LIPSCOMB: I object.
The COURT: Objection sustained.

By Mr. MADDOX:

Q. Did you testify in the police court, in the hearing of Mr. Pickford, that you gave Hudson money to work up the case against Pickford? A. I did not give it in that sense. I did testify that I thought I had given him $25. I found afterwards that I had made a mistake in that. I had given him $15. That is a part of
109 the duty of a State's Attorney. He has a right not only to employ——

Q. Never mind that now. A. That was $15 instead of $25. I testified that I thought it was $25.

Q. Did you get credit for it in your accounts with the State? (42) A. Yes; I charged it up against the county and got my pay.

Q. Did you charge $75 up against the county? A. No; that had nothing to do with the case. I have that chattel mortgage now. This $15 was charged up against the county and I got paid for it. I do not suppose half of it was spent, for generally they will pull your leg a little.

Q. Did not this occur in the police court? Were you not asked by the prosecuting attorney this question?

"There is something I would like to ask you; did you give Mr. Hudson any money or checks for any services in working the case up? A. I have given Mr. Hudson some money to pay for his buggy hire, and things of that sort."

A. Yes; I had. I put it at $25. Is not that correct?

Q. There is no amount mentioned. A. I think you will find it there. He claims that he had to get a buggy to go somewhere to look up some witnesses. I found afterwards that it was $15 instead of $25. (43)

Q. That trial in the police court that took place in the
110 police court in the early part of 1901; did it not? A. I came down to hear a trial. I was not familiar with the practice here. I had seen a notice of the Hopp-Hudson matter in the papers, and thinking that it was very important that I should inform myself as to whether or not I had secured—— (54)

Q. That is not my question. I ask you whether that trial took place in the police court in the early part of the year 1901? A. I could not tell you that—just the exact time.

Q. Do you not remember that it was in the early spring of 1901, in March or April? A. I think it was more than likely. It was about that time; but I could not fix the time exactly. I think you are right, in all probability.

Q. You were present in the court room and Mr. Pickford was present in the court room during that trial? A. Yes.

Q. Was it not developed at that trial, in your hearing and in the hearing of Mr. Pickford, that Mr. Kilgour had been State's Attorney for more than two years after this fire, and there had been

no attempt at an indictment on account of it? A. If it did, I do not recollect it.

Q. Do you not recollect that when you, yourself, were examined, your attention was, in part, addressed to the inquiry as to how it happened that you took the case up after Mr. Kilgour had gone out of office? A. That is possible, Mr. Davis; but I have no
111 independent recollection of it.

Q. Is it not also true that it developed at that trial, in the hearing of Mr. Pickford, that you could not name another person as a witness in support of the charge against him, except this man Hudson? A. I do not recollect that taking place. (55)

Q. Were you not asked, and did you not testify at the trial respecting the number of witnesses you summoned before the grand jury, and did you not, in the hearing of Mr. Pickford say that although you had a vague recollection that some witnesses were summoned or ordered to be summoned, none appeared in fact except the witness Hudson? A. I have no independent recollection of it: but as a matter of fact that is true.

Q. Did not this occur during your cross-examination?

"Q. Were there any other witnesses? A. I think there were some. I was in the grand jury room very little. I am not sure if these men appeared or not.

"Q. Are you acquainted with Mr. Hopp? A. No, sir; I never saw him before, to my knowledge. I may possibly have seen him, but I do not recollect it."

Mr. LIPSCOMB: From what are you reading?

Mr. DAVIS: I am reading from the testimony of Mr. Talbott before the police court. I am asking the witness whether these questions were not put to him and these answers given.

Q. Were you asked whether there were other witnesses
112 present besides Mr. Hudson? (56) A. I could not tell you.

Q. Did you not testify, in the hearing and presence of Mr. Pickford, as follows:

"I think there were some. I was in the grand jury room very little. I am not sure if these men appeared or not."

A. I have no recollection of it at all.

Q. Were you not, under the same conditions, asked:

"Are you acquainted with Mr. Hopp?"

And did you not answer:

"No, sir; I never saw him before to my knowledge. I may possibly have seen him, but I do not recollect him."

A. I do recollect something was said about Mr. Hopp.

Q. Were you not, under the same conditions, asked:

"You do not remember the names of any other witnesses in the case, besides Hudson?"

And did you not answer:

"I only remember that I ordered summonses for one or two other witnesses?"

A. Yes; there was a fellow down in Prince George's County, and one over by Silver Spring.

Q. Under the same conditions were you not asked:

"But you do not know whether they appeared or not."

And did you not answer:

"No, sir."

A. No, I did not.

Q. I am asking you whether you testified in this way
113 at the police court, under the same conditions: (57)

"And you do not know these other witnesses? A. There were others, but I do not know whether they appeared, and I am not sure of them"——

Did you not testify in that way?

A. I could not tell you. I was under examination there, and it has been five years ago, you know.

Q. Under the same conditions were you not asked:

"You cannot remember the names of any other witnesses?"

Then you were interrupted and asked whether you ever saw a certain man in the court-room before, and did you not answer:

"A. I did not say so. If I ever saw him before I do not remember him"?

That referred to Hopp; did it not?

A. I recollect that simply I was asked if I had ever seen Hopp before. I testified at the time that I had not, to the best of my recollection. When we went down there the deputy fire-marshal of the State of Maryland, who was investigating this charge of arson, suggested that we go and get lunch, and the old man suggested that we go to this 20th Century place.

Q. To Hopp's place? A. To Hopp's place. He boarded there, I believe. I did not know Hopp from the side of sole leather. We went there and afterwards I went out to the police court. Some time after that Mr. Hudson called my attention to the fact that Hopp was there in the lunch room when we took lunch there.
114 That may be true. I may have seen Hopp there, just as I say; but I never spoke to him so far as I know. (58) I may have seen him there, but if I did, I don't recollect it. I just do not know.

Q. You mentioned a man named Thompson, who brought about your introduction to Hudson? A. Yes.

Q. How long before you got the letter from Hudson did you know him at all? A. I never knew him at all.

Q. Before you were brought into communication with Hudson, did you become acquainted with Thom*sp*-n? A. I became acquainted with him by calling on him.

Q. Did you, at that time, learn who he was? A. He was the editor of this newspaper.

Q. Of the Washington Chronicle? A. The Washington Chronicle.

Q. Did you, at that time, know the character of that paper? A. No. (59).

EXHIBIT D.

In the Police Court.

THE UNITED STATES
vs.
FERDINAND HOPP and JAMES HUDSON.

Prosecution for Conspiracy and Blackmail.

115 *Extracts from Deposition of Talbott.*

By Mr. MULLOWNEY:

Q. There is something I would like to ask you; did you give Mr. Hudson any money or a check for any service in working the case up? A. I have given Mr. Hudson some money to pay for his buggy hire, and things of that sort.

Q. In what way did you give that; check or money? A. No, sir; in money.

Q. How much was it?

Mr. LIPSCOMB: I object. (63)

Mr. MULLOWNEY: Never mind. I do not care about that.

The WITNESS: Now, I may have given it to him in a check, but I do not recall that I did; I think it was money. No, I am sure it was money.

Q. Did you send a check here to town for $75? A. Yes; I did not give that——

Q. (Interrupting.) Who was that given to? A. That was to take up a bill of sale he had given on his stock there. He was in danger of losing everything, and the old man appealed to me very strongly, and I helped him.

Q. Was that for Mr. Hudson? A. Yes, sir.

Q. I expect to prove that Hopp got possession of that check, and that is why I want to know whether you sent a check, and payable to whose order? A. I say that it will cut no figure in this

116 case.

Q. To whose order was the check payable? A. The check was payable to the order of Jesse H. Wilson, my brother-in-law.

Q. And issued to be given to whom? A. To the owner of the chattel mortgage on old man (64) Hudson's printing machine.

Q. This man (indicating a man in the Court room)? A. Yes, sir. The old man told me in the course of conversation—he made a strong appeal to me personally, that his only means of livelihood he had was about to be taken away from him for the lack of $75.

Q. Do you mean to say that it was a personal loan? A. Yes, a personal and friendly loan. And I said, "Old man, I have the $75 by me, and if this chattel mortgage is right, I will send the money to my brother-in-law, and he will turn it over to you".

Q. That was simply a kindly act on your part, to loan the money to him? A. Yes, sir.

Q. And do you expect to get it back? A. I don't know. The old man put up a pitiful tale to me, and I loaned him the money.

Q. You do not know what became of the check? A. No, sir; I have not seen the check since I sent it on. (65)

117 SAMUEL MADDOX, a witness of lawful age, called by and on behalf of the complainants, having been first duly sworn, is examined.

By Mr. DAVIS:

Q. State your name and occupation? A. My name is Samuel Maddox. I am a member of the bar of the Supreme Court of the District of Columbia, and of other courts, and have been practicing law since January, 1876.

Q. Do you know the parties to this cause? A. I do. I know Thomas H. Pickford, Mr. Henry M. Talbott, Mr. Andrew A. Lipscomb, Mr. John H. Walter, Mr. William Ellison, and Mr. F. Edward Mitchell. I do not know the son of Henry Maurice Talbott, Thomas M. Talbott. I do not remember ever to have seen him.

Q. How long have you known the complainant Pickford?

Mr. RIDOUT: The question is objected to as immaterial.

A. I should say for fifteen or twenty years.

By Mr. DAVIS:

Q. Were you or not of counsel for Mr. Pickford in case No. 45622 at law in the Supreme Court of the District of Columbia, in an action by the defendant, Henry Maurice Talbott, against the complainant for libel? A. Is that the case in which a verdict for $8,500 was rendered?

Q. Yes. A. I was.

Q. What was your first relation to the matter out of which that suit arose?

118 Mr. RIDOUT: The question is objected to, and notice is given to counsel for the other side that all questions seeking to elicit from this witness the result of conversations between himself and his clients, or consultations between him and associate counsel, and the reasons if he attempts to give reasons, for any action taken or not taken, is objected to as immaterial, and as beyond the power of the Court in this case, on the ground, among others, that all of these questions, and all questions of a kindred nature, have already been litigated to a final conclusion, and have all been resolved against the complainants in this case.

To avoid the interruption of the testimony of Mr. Maddox, which will doubtless be interesting and instructive, it will be understood, with the assent of the other side, that these objections may be considered as reiterated wherever appropriate, without the physical repetition of the same.

Mr. DAVIS: Let it be so understood.

By Mr. DAVIS:

Q. Proceed, Mr. Maddox. A. My first connection with the matter of this indictment was on the morning that notice of it first appeared in the Washington Post. I was ill at my house at the time, and Mr. Pickford called upon me with regard to it, saying that he had noticed in the paper that he had been indicted, and he wanted to know what he should do. I unhesitatingly advised him to go to Rockville and submit to the jurisdiction of the court,
119 and stand trial. He followed my advice, and the same day he went to Rockville, entered his appearance in the case, and gave bail to appear when needed for trial. This was in the latter part of March, 1901. I associated with me, for the defense of the action, Mr. E. C. Peter, of Rockville. In the following fall I was advised by Mr. Peter that the criminal term of the court would open on a certain day, and on that day I went to Rockville and a day was fixed for the trial of the case. I do not remember whether or not I was accompanied by Mr. Pickford.

Q. Was Mr. Henry Maurice Talbott present? A. I know he was present when a day was fixed for the trial, which was probably a week or ten days later. I do not remember the exact time. On the day appointed for the trial I went to Rockville with Mr. Pickford, and some friends of his who had known him for a long time, and who were glad of an opportunity to testify as to his character. On the same train with me, as I now recall, was James Hudson, who had been, as was stated, the only witness before the grand jury in respect to the alleged fire or alleged arson. Mr. Talbott, the Prosecuting Attorney, was present in Court when the case was called. Judges Henderson and Motter were on the Bench when the case was called. Mr. Talbott immediately arose and moved for a continuance. He read, or stated that he was reading, a letter from somebody connected with an insurance company. I do not remember whom the letter was from and do not think he gave the name, nor did he give the name of the insurance company. The
120 extract from this letter was in reference to possible witnesses who knew the circumstances of the fire. He then asked for a further continuance of some days, so that he might possibly go down to the Sandy Springs or Burnt Mills, or some other district, and possibly discover witnesses. When he made this request, the Judge said he was disposed to grant the continuance, provided that, if Mr. Talbott did not succeed in finding witnesses, and was not ready to go on with the trial on the new day to be fixed, a plea of not guilty should be confessed by the State. I remember that expression very well, because it was entirely unknown to me. I had never heard it before. James Hudson was present in the court at the time.

Q. What did Mr. Talbott do? A. Mr. Talbott declined the extension on the condition required by Judge Henderson, namely, that a plea of not guilty should be confessed by the State, and entered a nolle pros.

Q. What, if anything, was said by the other member of the Court,

Judge Motter? A. Judge Motter indulged in some very caustic remarks.

Mr. RIDOUT: I desire to interpose, on behalf of Mr. Talbott, an objection to this proposed testimony, on the ground that it is not only vulnerable to all of the objections heretofore made, but upon the further ground that it is the rankest hearsay.

The WITNESS: These occurrences took place in the Rock-
121 ville court-house, after Judge Bradley had discharged the other three persons named in the indictment, under writs of habeas corpus, and after the nolle pros was entered by State's Attorney Talbott, Judge Motter said something to the effect that the indictment even of an innocent person was a very serious thing to keep hanging over his head; that they had now before them a man charged with crime who could not be brought by any legal proceeding within the jurisdiction of the court, but who had voluntarily come forward to stand trial on the charges made against him, and that it was an outrage to do a thing of that sort. I do not remember the exact words, but that is the purport of what he said.

Q. Were you again at Rockville in this matter? A. I was, in the following year, 1902. John H. Walter concluded that he did not want to be liable to arrest every time he went into Montgomery County, and he also determined to go up and submit to the jurisdiction of the court and stand trial, if the District Attorney saw fit to prosecute him under the indictment. At the opening of the Fall Term, in 1902, or about that time, I went with Mr. Walter to Rockville and he gave bail for his appearance when wanted. On the day fixed for his trial Mr. Walter and I went to Rockville.

Q. Do you remember what date that was? A. It was early in December, and I think it was on the first day of December. We went to Rockville together. Mr. E. C. Peter was associated
122 with me in the defense of the indictment against Walter. When the case was called for trial the prosecuting Attorney entered a nolle pros. Mr. James Hudson was not present in Court on this occasion, as I remember it, nor was any request made on the part of the Attorney for the Commonwealth, for a further postponement or continuance of the case.

Q. Were you or not present in the Police Court at the trial of Hopp and Hudson? A. I was not. That was during my illness.

Q. At the trial of case No. 45662 at law, in the Supreme Court of the District of Columbia, were you present and participating? A. I was.

Q. Who represented the defendant, Henry Maurice Talbott, the plaintiff in that case? A. Mr. Andrew A. Lipscomb, Mr. F. Edward Mitchell and Mr. Ellison.

Q. State whether or not any other suit or suits against Messrs. Pickford and Walter, or either of them, in the Supreme Court of the District of Columbia, grew out of this affair?

Mr. RIDOUT: Objected to on the grounds already stated, and on the further ground that any such suit, if such there be, is *res inter alios acta.*

A. There were two suits entered, one by James Hudson, and the other by Ferdinand Hopp, for malicious prosecution, growing out of the Police Court trial, to which allusion has been made.

Q. Who represented Hudson as counsel? A. Andrew A.
123 Lipscomb and Mr. Mitchell and Mr. Ellison.

Q. Who represented Hopp in his suit? A. Mr. Andrew Lipscomb was also connected with the suit that was brought by Ferdinand Hopp.

Mr. RIDOUT: All questions as to Hopp's suit are objected to on the grounds already stated.

By Mr. DAVIS:

Q. What, if anything, did you have to do with the habeas corpus proceedings instituted by Bradshaw, Shaw and Walter?

Mr. RIDOUT: The same objection.

A. I had nothing to do with them.

By Mr. DAVIS:

Q. Did you know one, John Q. Thompson, of the District of Columbia? A. I did not know him personally, although I did know somewhat of his reputation. I knew that he was a journalist and newspaper man of some sort.

Mr. RIDOUT: This testimony is objected to as being hearsay, in addition to the other objections which have been noted.

By Mr. DAVIS:

Q. I show you a book. Do you recognize this as Boyd's Directory of the District of Columbia for the year 1900 (exhibiting the book to the witness)? A. I do.

Q. On page 966 of this book, I find the name "Thompson,
124 John Q. 715 11th street, northwest." State whether or not that is the Thompson of whom you speak?

Mr. RIDOUT: The question is objected to as hearsay, and on the further ground that in the light of the testimony of this witness, it must be a physical impossibility for him to testify with positiveness that this is the same man as the one of whom he has already spoken.

A. The Thompson, I have reference to is the man who conducted a sheet, as I remember it, called the Washington Chronicle, which was an incendiary sort of organ, given to sensational articles, and I have heard it said somewhat given to blackmail.

Mr. RIDOUT: This testimony is objected to as the rankest hearsay, and I object to encumbering the record with testimony of this character.

By Mr. DAVIS:

Q. Do you know his reputation in the particulars you have just indicated? A. Not except that I have heard people talk about him.

He was a man, as I say, who was given to sensational articles, and who would publish or not publish such articles for money.

Mr. RIDOUT: The objections heretofore made are repeated, in an intensified form, to all of this testimony.

Mr. DAVIS: That concludes my examination.

Mr. RIDOUT: I have no cross-examination.

Mr. MITCHELL: I have no cross-examination.

Mr. ELLISON: I have no cross-examination.

SAM'L MADDOX.

125 Subscribed and sworn to before me this 26th day of October, A. D. 1909.

WM. HERBERT SMITH,
Examiner in Chancery.

Mr. DAVIS: Mr. Alexander Kilgour is a non-resident of the District of Columbia, and resides in Rockville, Montgomery County, Maryland; he was under engagement to appear as a witness this afternoon, which engagement he has been unavoidably prevented from keeping, and he has notified counsel of his inability to be present only as lately as between the hours of one and two o'clock this afternoon, for which latter hour this session was noted. He is expected to be in Washington to-morrow, in anticipation of which counsel for the complainants request an adjournment until to-morrow morning at 11 o'clock.

Mr. RIDOUT: Counsel for the defendant Talbott will not object to the brevity of the notice and will attend the taking of the testimony, unless actually engaged in some one of the courts at the time named.

Mr. MITCHELL: Counsel for the defendant Lipscomb will attend at 11 o'clock to-morrow, but will object to proceeding with the testimony of Mr. Kilgour at that hour, unless his client, Mr. Lipscomb, can be present, Mr. Lipscomb having expressed, before leaving this session, the possibility of his being engaged in the Court of Appeals.

The further taking of these depositions was thereupon adjourned until Thursday, October 21, 1909, at 11 o'clock A. M. at the office of Samuel Maddox, Esq.

126 WASHINGTON, D. C., THURSDAY, *October* 21, 1909—
11 o'clock a. m.

Met pursuant to adjournment.

No witnesses being present, the further taking of these depositions was thereupon adjourned to Thursday, October 21, 1909, at 3:30 o'clock, P. M., at Rockville, Maryland.

EXAMINER'S NOTE.—The certified copy of the indictment mentioned in the bill of complaint and the docket entries of the Circuit Court of Montgomery County in relation thereto, mentioned by counsel for the complainants on page 1 of the record, have been handed to the examiner for filing, and the same are in the words and figures following, to-wit:

STATE OF MARYLAND,
Montgomery County, To wit:

In the Circuit Court for Montgomery County.

At a Circuit Court of the Sixth Judicial Circuit of the State of Maryland, comprehending the Counties of Frederick and Montgomery, begun and held for Montgomery County, at the Court House in the Town of Rockville in said Montgomery County, on the third Monday of January, same being the fifteenth day of the same month, in the year nineteen hundred and six,

127 Were present The Honorable James B. Henderson, Associate Judge, James P. Gott, Sheriff and John L. Brunett, Clerk.

In the record of proceedings of said Court, amongst others were the following, to wit:

No. 1, Criminals. March Term, 1903.

STATE OF MARYLAND
vs.
GRANVILLE C. SHAW, AARON BRADSHAW, THOMAS H. PICKFORD, JOHN H. WALTER.

Be it remembered that heretofore, to wit; on the twenty sixth day of March A. D. 1901, was filed in Court here a Presentment against the said Granville C. Shaw, Aaron Bradshaw, Thomas H. Pickford and John H. Walter of the tenor and in the words following, to wit:

STATE OF MARYLAND,
Montgomery County, To wit:

In the Circuit Court for Montgomery County.

The Grand Jurors of the State of Maryland, for the body of Montgomery County, upon their oaths and affirmations pre-

128 sent that Granville C. Shaw, Aaron Bradshaw, Thomas H. Pickford and John H. Walter, late of said County, on the eleventh day of September in the year of our Lord eighteen hundred and ninety seven, at the County aforesaid, unlawfully and maliciously did set fire to and burn an untenanted dwelling house at the County aforesaid, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

WILLIAM B. MOBLEY, *Foreman.*

Upon the evidence of James Hudson.

And thereupon the same day was filed in Court here an Indictment and True Bill of the tenor and in the words following:

STATE OF MARYLAND,
Montgomery County, to wit:

In the Circuit Court for Montgomery County.

The Grand Jurors of the State of Maryland for the body of Montgomery County, upon their oaths and affirmations present that Granville C. Shaw, Aaron Bradshaw, Thomas H. Pickford and John H. Walter, late of said County, on the eleventh day of September in the year of our Lord eighteen hundred and ninety seven, at the County aforesaid, a certain untenanted dwelling house, of the property of said Thomas H. Pickford and John H. Walter, there situate, unlawfully, wilfully, and maliciously did set
129 fire to, and the same house then and there by such firing as aforesaid unlawfully, wilfully and maliciously did burn and consume, contrary to the form of the Act of Assembly in such case made and provided, and against the peace, government and dignity of the State.

HENRY MAURICE TALBOTT,
The State Attorney for Montgomery County.

Upon the back of said Indictment appears the following endorsements:
"Indictment." "True Bill." William B. Mobley, Foreman.

And thereupon on motion of H. Maurice Talbott, Attorney who for the State doth prosecute, a Bench Warrant of the State of Maryland issued forth from the Court here, of the tenor and in the words following, to wit:—

STATE OF MARYLAND,
Montgomery County to wit:

State of Maryland to the Sheriff of Montgomery Count, Greeting:

You are hereby commanded to take Thomas H. Pickford late of Montgomery County, yeoman, if he shall be found in your bailiwick, and him safe keep, so that you have his body, before the Circuit Court for Montgomery County, now in session, at the Court House in Rockville, in and for said County, immediately, to answer unto the State of Maryland, of and concerning a certain
130 Statutory Burning contempt and misdemeanor by him committed as it is presented, and so forth.

Hereof fail not at your peril, and have you then and there this Writ:

Witness the Honorable James McSherry, Chief Judge of the said Court the 18th day of March 1901.

Issued the 26th day of March 1901.

[SEAL.] THOMAS DAWSON, *Clerk.*

And afterwards, to wit: on the twenty ninth day of March A. D. 1901 came into Court here, Arthur William- Esquire, Sheriff of Montgomery County, to whom the writ aforesaid was in form afore-

said directed and makes return thereof to the Court here thereon endorsed, to wit: "Cepi, Arthur Williams, Sheriff."

Also issued forth from the Court here a Bench Warrant of the State of Maryland, of the tenor and in the words, following, to wit:

STATE OF MARYLAND,
Montgomery County, To wit:

State of Maryland to the Sheriff of Montgomery County, Greeting:

You are hereby commanded to take Granville C. Shaw, late of Montgomery County, yeoman, if he shall be found in your bailiwick, and him safe keep, so that you have his body immediately before the next Circuit Court for Montgomery County, now in session, at the Court House in Rockville in and for said County,
131 to answer unto the State of Maryland of and concerning a certain Statutory, Burning contempt and misdemeanor by him committed as it is presented and so forth.

Hereof fail not at your peril, and have you then and there this Writ:

Witness the Honorable James McSherry, Chief Judge of the said Court the 18th day of March 1901.

Issued the 26th day of March 1901.

[SEAL.] THOMAS DAWSON, *Clerk.*

And afterwards, to wit: On the first day of June A. D. 1901, comes into Court here, Arthur Williams, Esquire, Sheriff of Montgomery County, to whom the writ aforesaid, was in form aforesaid directed and makes return thereof to the Court here, thereon endorsed, to wit "Non Est, Arthur Williams, Sheriff."

Also issued forth from the Court here a Bench Warrant of the State of Maryland, of the tenor and in the words, following, to wit:

STATE OF MARYLAND,
Montgomery County, To wit:

State of Maryland to the Sheriff of Montgomery County, Greeting:

You are hereby commanded to take John H. Walter, late of Montgomery County, yeoman, if he shall be found in your bailiwick, and him safe keep, so that you have his body before the Circuit Court for Montgomery County, now in session at the Court House in Rockville in and for said County, Immediately, to answer unto the State of Maryland of and con-
132 cerning a certain Statutory Burning, contempt and misdemeanor by him committed as it is presented, and so forth:

Hereof fail not at your peril, and have you then and there this Writ:

Witness the Honorable James McSherry, Chief Judge of the said Court the 18th day of March 1901.

Issued the 26th day of March 1901.

[SEAL.] THOMAS DAWSON, *Clerk.*

And afterwards, to wit: on the first day of June A. D. 1901, comes into court here, Arthur Williams, Esquire, Sheriff of Montgomery County, to whom the Writ aforesaid, was in form aforesaid, directed, and makes return thereof to the Court here, thereon endorsed, to wit: "Non Est Arthur Williams, Sheriff."

Also issued forth from the Court here a Bench Warrant of the State of Maryland, of the tenor and in the words, following, to wit:

STATE OF MARYLAND,
Montgomery County, To wit:

State of Maryland to the Sheriff of Montgomery County, Greeting:

You are hereby commanded to take Aaron Bradshaw, late of Montgomery County, yeoman, if he shall be found in your bailiwick, and him safe keep, so that you have his body immediately before the Circuit Court for Montgomery County, now in session at the Court House, in Rockville, in and for said County, to answer unto the State of Maryland of and concerning a
133 certain Statutory Burning, contempt and misdemeanor by him committed as it is presented, and so forth.

Hereof fail not at your peril, and have you then and there this Writ:

Witness the Honorable James McSherry, Chief Judge of the said Court the 18th day of March 1901.

Issued the 26th day of March 1901.

[SEAL.] THOMAS DAWSON, *Clerk.*

And afterwards to wit: on the first day of June A. D. 1901, comes into Court here, Arthur Williams, Esquire, Sheriff of Montgomery County, to whom the writ aforesaid, was in form aforesaid directed and makes return thereof to the Court here, thereon endorsed, to wit: "Non Est, Arthur Williams, Sheriff."

And on said twenty ninth day of March, A. D. 1901, the said Thomas H. Pickford, entered into Recognizance the sum of Three thousand Dollars, for his appearance, to answer unto the State of Maryland, the charges set forth in said Indictment.

And thereupon all proceedings in said cause were continued till the next term of Court.

And afterwards alias writs were issued for the Traversers, Granville C. Shaw, Aaron Bradshaw and John H. Walter to all of which respective Writs the Sheriff made return thereof to the Court
134 here, endorsed thereon "Non Est."

And afterwards to wit: on the twenty seventh day of November A. D. 1901, come into Court here the Traverser Thomas H. Pickford as well as the State of Maryland by H. Maurice Talbott the State's Attorney for Montgomery County, who for the State doth prosecute and Edward C. Peter, Esquire and Samuel Maddox, Esquire, Attorneys who appear for Thomas H. Pickford. Whereupon a hearing of said Indictment was had.

And thereupon on motion of H. Maurice Talbott, the State's Attorney for Montgomery County, on said twenty seventh day of

November, a Nolle Pros. of said Indictment was entered by Order of State's Attorney in Open Court as to said Thomas H. Pickford.

And thereupon all further proceedings in said cause were continued.

And afterwards alias writs were issued for the Traversers, Granville C. Shaw, Aaron Bradshaw and John H. Walter, to all of which respective Writs, the Sheriff made return thereof to the Court here, thereon endorsed "Non Est."

And afterwards, to wit: on the second day of December, A. D. 1902, comes into Court here John H. Walter, by Edward C. Peter, Esquire and Samuel Maddox, Esquire, Attorneys, who appear for the said John H. Walter, as well as the State of Maryland, by H. Maurice Talbott, the State's Attorney for Montgomery County, who for the State doth prosecute. Whereupon on said second day of December A. D. 1902, said John H. Walter by his said Attorneys entered a plea of Not Guilty and submitted the case to the Court and Trial. Whereupon upon motion of H. Maurice Talbott,
135 the State's Attorney for Montgomery County, on said second day of December A. D. 1902, a Nolle Pros. of said Indictment was entered by Order of State's Attorney in open Court as to said John H. Walter.

And thereupon all further proceedings in said cause were continued.

And afterwards alias Writs were issued for the Traversers, Granville C. Shaw and Aaron Bradshaw, to both of which respective Writs the Sheriff made return thereof to the Court here, thereon endorsed, "Non Est."

And afterwards, to wit: on the twenty sixth day of March A. D. 1903, said case was placed upon the Stet Docket by Order of Court.

STATE OF MARYLAND,
Montgomery County, To wit:

I hereby certify that the foregoing has been truly taken and copied from the Record and Proceedings of the Circuit Court for Montgomery County, in the foregoing cause.

In testimony whereof I hereto set my hand and affix the seal of the Circuit Court for Montgomery County, this 23rd day of February, 1906.

[SEAL.]

JOHN L. BRUNETT,
Clerk of the Circuit Court
for Montgomery County.

136 *Docket Entries.*

No. 1. Criminals. March Term, 1903.

STATE OF MARYLAND
vs.
GRANVILLE C. SHAW, AARON BRADSHAW, THOMAS H. PICKFORD, and JOHN H. WALTER.

March 26th, 1901, Presentment filed.
March 26th, 1901, Indictment and True Bill for Statutory Burning Filed, and Bench Warrants issued.
Granville C. Shaw, returned Non Est.
Aaron Bradshaw, returned Non Est.
John H. Walter, returned Non Est.
Thomas H. Pickford, returned Cepi.
Alias Writs issued for all Traversers returned Non Est.
November 21st, 1901, Messrs. Edward C. Peter and Samuel Maddox appeared in Court for the Traverser, Thomas H. Pickford.
November 27th, 1901, Nolle Pros. by Order of the State's Attorney in Open Court as to Thomas H. Pickford.
December 2nd, 1902, Messrs. Edward C. Peter a*bd* Samuel Maddox, appear in Open Court here *from* John H. Walter.
1902 Dec. 2nd, Plea not guilty as to John H. Walter.
1902. Dec. 2nd. Submitted to the Court and trial as to John H. Walter.
137 1902, Dec. 2nd. Nolle Prosequi as to John H. Walter.
March 26th, 1903, Continued to the Stet Docket as Granville C. Shaw and Aaron Bradshaw.
Vide No. 537 Stet Docket J. A. No. 1 folio 270.

STATE OF MARYLAND,
Montgomery County, To wit:

I hereby certify that the above has been truly taken and copied from the Docket Entries in the aforegoing cause.

In testimony whereof I hereto set my hand and affix the seal of the Circuit Court for Montgomery County, this 20th day of October, A. D. 1909.

[SEAL.]

JOHN L. BRUNETT,
Clerk of the Circuit Court for Montgomery County, Maryland.

STATE OF MARYLAND,
Montgomery County, To wit:

I, Glenn H. Worthington, Chief Judge of the Sixth Judicial Circuit of the State of Maryland, said Circuit being composed of the Counties of Frederick and Montgomery, do hereby certify that the foregoing attestations are in due form and by the proper officer.

Given under my hand and seal this 21st day of October,
138 A. D. 1909.

GLENN H. WORTHINGTON,
Chief Judge of the Sixth Judicial Circuit of Maryland.

STATE OF MARYLAND,
Montgomery County, To wit:

I, John L. Brunett, Clerk of the Circuit Court for Montgomery County, Maryland, do hereby certify that the Honorable Glenn H. Worthington, whose genuine signature is attached to the foregoing certificate, was at the time of signing the same Chief Judge of the Sixth Judicial Circuit of Maryland, composed of the Counties of Frederick and Montgomery, duly commissioned and qualified.

In testimony whereof I hereto set my hand and affix the seal of the Circuit Court for Montgomery County, this 22d day of October, A. D. 1909.

[SEAL.] JOHN L. BRUNETT,
Clerk of the Circuit Court for Montgomery County.

ROCKVILLE, MD., *October* 21, 1909—
3:30 o'clock p. m.

Met, pursuant to notice.
139 Present on behalf of the complainants, Mr. Maddox and Mr. Davis.

Present on behalf of the defendant, Mr. Ridout and the defendant, Henry M. Talbott, in person.

ALEXANDER KILGOUR, a witness of lawful age, produced by and on behalf of the plaintiff, being first duly sworn, is examined

By Mr. DAVIS:

Q. Mr. Kilgour, what is your name? A. Alexander Kilgour.

Q. And your age? A. I am in my 51st year.

Q. What is your occupation? A. Lawyer.

Q. Where do you reside? A. At Rockville, Montgomery County, Maryland.

Q. How long have you been a member of the bar? A. Since the fall of 1882.

Q. Were you at any time State's Attorney for the County of Montgomery, State of Maryland? A. Yes; from January, 1896, to January, 1900.

Q. You are familiar with the character of this case and the fact that a certain fire, which occurred in this County in September, 1897, figures in the case? A. Yes, I have a general knowledge of it.

Q. During your term of office as State's Attorney state,
140 if you please, whether the matter of that fire was brought to your attention officially? A. Yes sir, it was.

Q. Please state the circumstances. A. Some person interested in the matter at the time of the fire called my attention to it, and it

was the subject matter of inquiry and investigation by the authorities of the county.

Q. State whether or not Mr. Andrew A. Lipscomb, one of the defendants, ever conferred with you or communicated with you in relation to the fire. A. Yes; after I had first learned of the fire, I had a telegram from Mr. Lipscomb to call at his office in Washington, as he wished to see me upon a matter of importance. I responded, and went to see him. His office was then at 5th and D Streets.

Q. You say you responded to that request. Did you, as a result, have a talk with Mr. Lipscomb? A. I did. I went to his office in Washington one morning very soon thereafter, possibly immediately.

Q. State, if you please, as fully as you can what took place at your interview with Mr. Lipscomb on that occasion? A. He told me that he had information in reference to the burning of this house, and said that the party from whom he had obtained it was an accomplice. I asked him for the name, and he said he did not care to give it; that he would withhold it, and that he would appear against the parties. He wanted—it seemed that that is what he required—that this party should be given immunity
141 from prosecution. I had told him I had no right to concede that immunity, but that if he was a valuable witness, and the State could discover the crime and convict the perpetrators of it, and would be indebted wholly to him for the testimony—I mean the accomplice—I had no doubt but what the Court, the authorities, would extend to him immunity. He asked me, too, if I would put that in writing. I recall that. I told him that I would not. He said in that conversation that he was the counsel for the insurance companies, or that he represented them, I have forgotten which; at any rate, that he could control them; that their object was to convict the perpetrators of the offense; that they did not care for the money; that they had paid, as I recall it, to be accurate, about $23,000; and that they would spend that money, or relinquish it. That was about it. After he stated the facts to me, that this property was owned by these people and that the testimony upon which he relied was that of an accomplice, I spoke of the fact of the uncertainty, the impossibility of procuring a conviction upon such testimony. I had the impression that it would be wholly unavailing, standing alone, and I think I said to him at the time, because I had well defined views on the law in reference to the subject, that no offense was committed, if based upon the fact of a man destroying his own property; and possibly I said to him—I think I did say to him—something in reference to the fact that the insurance companies—that the office should not be used for the purpose of collecting money for the insurance companies. It has been a long time, but I think that phase of the question was gone into, and I expressed
142 myself about it. He gave me the impression—I can't say now from memory wholly—that this money if recovered back from these people, was to be paid counsel in the matter, and

that there was to be some sort of disposition of it on those lines. As I say, I do not recall the fact whether the proposition was made by him to me or not, but I gathered that impression from the interview with him. I left him with the impression that the matter would not be seriously considered, from those facts.

Mr. TALBOTT: I note an exception to all of the witness' impressions.

A. I left him and told him that if he had witnesses to show that any offense had been committed, to send them up to Rockville, and that I would see that they were presented to the grand jury, and that the whole matter was considered. I never saw Mr. Lipscomb in reference to the matter after that, nor said anything to him but once. That was a long time after I was State's Attorney. He met me in Washington on the corner of New York Avenue and 14th Street, and asked me not to say anything about what was said by him to me.

Mr. TALBOTT: That was after you were State's Attorney?

The WITNESS: Yes sir.

Mr. MADDOX: You mean after your term had expired.

The WITNESS: Yes sir.

By Mr. DAVIS:

Q. Mr. Kilgour, when you speak of your impression that a disposition of the money was to be made along those lines, what do you mean? Along what lines? A. I understood from him
143 that in case of a successful prosecution of these people, this insurance money could be recovered back; and he did say that the companies did not want the money, that he had control of them, was their counsel, or something of that sort, and that it was to be disposed of in that way.

Mr. TALBOTT: I note an exception to that answer.

By Mr. DAVIS:

Q. Did you or not understand, from that, that there would be a division of this money? A. Well, his proposition, and what he said, clearly and emphatically gave me the impression from the interview, that the money was to be divided in some way or another with counsel. He did not say to me, in words, who the lawyers were, or how it was to be, or what it was to be. There was nothing of that kind said that I recall. It has been a long while ago. Shall I give my impressions about it?

Mr. TALBOTT: We do not want your impressions, Mr. Kilgour. You are a lawyer, and you know that is improper. He has asked you a proper question, and you should answer the question and tell what was said. You are coming as far from it as any human being can come.

A. Well, that is a question.

By Mr. DAVIS:

Q. You may state, Mr. Kilgour, what was the impression made

upon you by the interview with Mr. Lipscomb with respect
144 to the persons among whom this money, if recovered, was to be divided?

Mr. TALBOTT: Note an exception to that question.

A. My impression unmistakably was that it would go, of course, to those who were instrumental in recovering it, whoever they might be.

Q. Did you not understand yourself to be included in that number?

Mr. TALBOTT: Note the exception.

A. Well, those were the facts, and I suppose my impressions and inferences were just what anybody else would have drawn under the circumstances. That is the best I can give.

Mr. TALBOTT: Mr. Davis, I will have to ask you for a little information as to your practice. With us, in noting exceptions, when the question is a leading question, we then state upon what ground we base the exception, that is to say, that the question is a leading and suggestive question. Other than that, the bare noting of the exception carries all the legal exceptions to it. Is that your practice?

Mr. DAVIS: No. It is requisite to state the ground of the exception, and the statement of any one ground confines you to that.

Mr. TALBOTT: Then I shall ask the indulgence of counsel to put the grounds in there when I get those questions.

Mr. DAVIS: You may state now your objections, and let it be understood that these grounds shall apply to all questions heretofore objected to, and all that you hereafter make.

Mr. TALBOTT: Go ahead; I'll fix them later.

145 (The question was read as follows):

"Q. Did you or not understand yourself to be included in that number?" A. Upon further reflection, in answer to that question, I will say unhesitatingly yes.

By Mr. DAVIS:

Q. What, if anything, did you say to Mr. Lipscomb, with reference to that particular part or phase of his proposition?

Mr. TALBOTT: Note the exception as leading and suggestive, counsel having already asked the witness to give the conversation, and the witness having attempted to do so.

A. I don't undertake to say that he used words at all saying directly that the money these people had paid, which was to be recovered back, and which the company did not want, was to be divided between me or anyone else. I undertake to say that from the proposition and statement of facts to me under the circumstances, I drew that inference.

Mr. TALBOTT: Note an exception to the answer of the witness as giving only an inference drawn from the conversation.

By Mr. DAVIS:

Q. My question, Mr. Kilgour, is what, if anything, did you say to Mr. Lipscomb, when you were aware of the impression which you have testified to? A. I was more influenced by that phase of the inference after I left him than before; but I did say to him, gave him the impression, and I think told him, that there
146 was no case which could be sustained in Maryland against these people, and I left. I never went to see him about it again. I don't know whether I said it or not, but I believe I told him then that a man had the right to burn his own house. I knew that to be the law.

Mr. TALBOTT: Note an exception to the rambling of the witness.

The WITNESS: I am not sure about that. I wouldn't like to put that down.

By Mr. DAVIS:

Q. What, if anything, was said in that conversation by either Mr. Lipscomb or yourself as to the criminal courts of Montgomery County being used to collect money?

Mr. TALBOTT: Note the exception, for the reason that the question is leading, and because the witness has already been interrogated as to the conversation that took place.

A. I can't recall what was said about that, but it seems to me——

Mr. TALBOTT: Note the exception.

A. When the statement was made that the insurance company did not want the money, or something of that kind, I made some such remark that they should not use the courts for collecting money, or something of the kind. That was some sort of a casual remark. I don't know whether I said that or not. I wouldn't say that I did say that, or whether that phase of the question was discussed. It has been so long.

Q. After this interview with Mr. Lipscomb, you say you
147 had no further talk with him until after you ceased to be State's Attorney, and that you have already narrated. After you ceased to be State's Attorney, and while Mr. Talbott was State's Attorney, did he or not at any time talk to you about this fire, and an attempted prosecution for it? A. Who do you refer to; Lipscomb?

Q. No; Talbott. A. No; I don't think Mr. Talbott and I ever talked about it at all. I don't think we did, one way or the other.

Q. Did Mr. Talbott at any time make any inquiry of you about it? A. I don't think we ever talked about it. I didn't know anything about it until these indictments were returned.

Q. Do you know James Hudson? A. Yes sir.

Q. State whether or not he was brought to you in connection with this matter at any time while you were State's Attorney? A. No sir; he was not. The day I had the interview with Mr. Lipscomb, he said he would not give me the name of the party upon whom he relied to prove this transaction.

Q. When did you first know that Hudson was the party, if you ever did know? A. After the indictments were returned in the Montgomery County Court.

148 Q. In speaking of the insurance companies, did or did not Mr. Lipscomb indicate what insurance companies he was speaking of? A. No; he did not. He just said insurance companies.

Q. I did not mean whether he gave you the names of the companies, but did he in conversation indicate what, if any, relation the insurance companies had with this fire? A. He told me the insurance companies that had insured this house of Pickford. Those were the insurance companies to which he referred and to which the conversation was directed.

Q. In fact, during your term of office as State's Attorney, there was no prosecution or attempted prosecution of anybody for this fire? A. There was not. I made all of the investigation about it that I could, but I could obtain no tangible proof on which any decisive action could be taken. I asked Mr. Lipscomb to send what witnesses he had to me, and I would send them to the grand jury.

Cross-examination.

By Mr. TALBOTT:

Q. Mr. Kilgour, is your recollection of events better now than it was six or eight or ten years ago, or does your recollection improve with age? A. I think that it does improve with age. Mine does.

149 Q. You think, then, that you can recollect events and facts and figures better now than you could six or eight years ago? A. I can.

Q. Or a month ago, or three months ago. A. I can, I think, but I don't believe my memory is as tenacious as it was.

Q. Then you think your memory is better now than it was four months ago? A. No; I do not.

Q. You have filed an affidavit in this case in which you state that you had a conversation with Andrew Lipscomb. Will you state when that conversation took place. A. With Lipscomb?

Q. Yes. A. The conversation to which I have testified?

A. The one to which I refer is the one immediately subsequent to the telegram you received from him. A. It took place, I think, in about 1908, after this——

Mr. MADDOX: 1898.

Mr. TALBOTT: One moment, Mr. Maddox. Do not prompt the witness.

A. I will correct it. I will get it right. It was 1898.

Q. When did the fire take place? A. Prior to that.

Q. I know, but I ask you when? A. I don't know.

150 Q. As a matter of fact, your recollection is not as good, then, as it would have been on the 13th or 14th of September, 1897? A. That is another question.

Q. You would have known, on the 15th of September, of this fire, that took place on the 13th of September, 1897, would you not?

A. I don't know whether I would have known it or not. I would not have known it unless it had been brought to my attention.

Q. Did you not see it in the newspapers? A. I don't recall that I did.

Q. You recollect the fire, don't you? A. At the time?

Q. Yes. A. No sir.

Q. You recollect it now? A. I do not. I knew nothing about it until long after the fire occurred, and then it was from hearsay. I had no knowledge of the fire.

Q. Don't you read the newspapers? A. I do, sometimes.

Q. Don't you recollect that that fire created quite an inquiry in this county, on account of the size of the house, and other peculiarities of it? A. My knowledge of that fire was derived from people. Possibly I did see it in the newspapers. I don't know.

151 Q. It was a large house, was it not? A. Yes.

Q. How long after this fire, which was on the 13th of September, 1897, before you received the telegram from Mr. Lipscomb. A. Now, that is what I can't state; nor can I say when that telegram was received and when that interview was had.

Q. Was it as much as two months after? A. I say I can't remember. I know this, that it was after I had heard of the fire. It was after I made an effort to investigate it and in reference to whether or not it was the work of an incendiary, and after the matter had been dropped from my consideration.

Q. Mr. Kilgour, was it in the fall of 1897? A. I can't say whether it was in the fall, but it was about two months, or a month, preceding some term of the grand jury.

Q. There were two terms of the grand jury, Mr. Kilgour, one in November of 1897, and the other in March of 1898. Was it immediately preceding one of those two terms? A. I couldn't say.

Q. But you have said, Mr. Kilgour, that it was immediately preceding one of the terms of the grand jury of Montgomery County. A. I say the interview that I had with him was a month or thereabouts before the ensuing grand jury term of this court.

152 —. That was, then, either the November term of 1897, or the March term of 1898. Is not that right? A. It was one of those terms, I suppose. It seems to me that it was in the winter. I don't know. It seems to me that if I would depend wholly upon my impressions in reference to it—that is about all I have—it was in January or February.

Q. But it was about a month preceding one of the terms of the grand jury? A. A month or six weeks, or something like that, I would suppose.

Q. Was it as much as a year after the fire, Mr. Kilgour—this conversation you had? A. Oh, no; it was not. I don't know. I say it was not; I can't locate it. It may have been a year. I can't say at all. I can't fix it.

Q. Have you not just said that it was in the winter and that it was four or six weeks prior to one of the terms of court, which must have put it either four or six weeks ahead of the November term, or four or six weeks ahead of the March term? A. I didn't say it

was in the winter. I said it was my impression that possibly it was in January or February.

Q. Of what year? A. I don't know. I think, though, as I say, it was after the fire.

Q. Of course it was after the fire. We all know that. A.

153 I can't state the year, but I suppose, though, it was 1898.

Q. That is as near as you can come to it? A. Yes sir.

Q. When did you first know of any efforts on the part of Mr. Talbott, in investigating this fire? A. I never knew anything about it until after the indictment, I don't think. I know I did not.

Q. You are sure of that? A. I think so.

Q. Will you state, then, why you used the expression in the affidavit that you have recently filed, of date April 6, 1909:

"That shortly after the said Talbott entered upon the discharge of his duties, I learned that he was at work trying to secure the indictments against Thomas H. Pickford and John H. Walters, who were the owners of the property burned"?

A. In that affidavit there, I never learned that you were trying to secure the indictments at all, because I never knew anything about it until after the indictments were returned.

Q. Why did you put that in your affidavit if it was not true? A. Well, I didn't prepare that affidavit. It was prepared in Mr. Maddox's office by the stenographer.

Q. You read this affidavit, did you not? A. Yes, but I overlooked that portion of it, because I didn't know anything about it at all until after the indictments were returned.

154 Q. Then your recollection now varies from your recollection about the time of this affidavit? A. No; it is not that. I am absolutely certain that I never knew anything about this at all until after these indictments were returned.

Q. I know that. Do you know when the indictments were returned? A. I did know.

Q. Do you know now? A. The dates? No; I can't say that I do.

Q. Upon the assumption that you were stating the truth then when you have just said that your recollection improved with age and got more accurate as the years advanced, why is it that you cannot tell now when that indictment was found, when you knew at the time when it was found? A. I knew generally, because it was a general matter of comment, a matter of record here.

Q. But you have just said, in good faith, I presume that your recollection improves as the years and months advance. A. I think it does, and it does.

Q. You still insist that it does? A. Yes sir.

Q. Is that right? A. I say my memory is better now than it was——

Q. Will you state how this affidavit of April 6th was gotten from you? Just tell all of the facts. A. The attorneys for Mr.——

155 Q. Name the attorneys. A. Mr. Maddox knew of this information that I had, and they asked me if I would make an affidavit to it, in substance, of the facts which I stated there.

Q. When and how did they know that you knew of these facts,

as you allege? A. I think you had me as a witness in Washington. That is the way the thing developed. I think you had me as a witness in your case against these people.

Q. Did you testify to the same facts as you have testified to in this affidavit? A. I testified to the facts that I referred to in Washington.

Q. Are they the same facts? A. I don't know.

Q. Or are the alleged facts the same? A. If you direct my attention to any of the facts, I will answer; but that is too general. I don't remember all my testimony in Washington.

Q. You were telling the truth? A. I say what fact to you refer to?

Q. One moment. You were telling the truth at the trial of the case in Washington, were you not? A. Yes; I tried to.

Q. You were telling the truth at the trial of the case of Talbott against Pickford, were you not? A. Yes sir.

Q. Your memory since has gotten absolutely accurate with
156 the passing of time, I suppose? A. That is a question.

Q. When you made the statement in Washington that the amount of money that the insurance companies paid out was $23,000, and in your affidavit you put it at $22,000, will you state which is correct? A. I can't state now. I know that in the conversation $22,000 may have been mentioned, $23,000 may have been mentioned, $21,000 may have been mentioned. I wouldn't undertake to say accurately which, but I know that the amount of money was mentioned by Lipscomb that was paid by the insurance companies.

Q. Mr. Kilgour, why, if it could have been $21,000, $22,000 or $23,000 in this conversation, did you put in the affidavit of $22,000, and in the testimony taken this afternoon in chief, you put it $23,000, and in your testimony in the trial of the case you put it at $23,000? A. I don't know, unless my memory is not clear upon the amount, which is a fact now. I couldn't say whether it was $21,000 or not. My impression is now it was $21,000.

Q. Your impression is now that it was $21,000? A. I don't know. I can't say what the amount was.

Q. But I am asking you now? A. I have heard so much about it now. I say my impression is it was $21,000, since you are insistent about it.

Q. Is your recollection about other facts as clear and as definite and as accurate as it is about the amount mentioned? A.
157 I suppose so.

Q. No more accurate? A. I have the same impressions in reference to the other facts.

Q. How many conversations did you have with Mr. Lipscomb, Mr. Kilgour? A. Only one. I had one in his office with him about it, as I have stated.

Q. That is the one spoken of? A. Yes sir.

Q. Then the next and only one after that is the one you had after you had gone out of office? A. Yes; it was after this trouble had begun. I don't know when it was. It was on the corner of New York Avenue and 14th street.

Q. Then it was after the indictments were returned—the second conversation you had with him? A. Oh, yes.

Q. Will you state what Mr. Lipscomb said to you in this conversation, that would indicate that he represented the fire insurance companies? A. He said so. He said emphatically that he represented the fire insurance companies, or controlled them, one or the other.

Q. Did you ever give Mr. Hudson a letter of immunity? A. I did not.

Q. Did you ever write a letter for Mr. Lipscomb for Mr.
158 Hudson? A. Never. I didn't know Hudson's name.

Mr. DAVIS: This line of inquiry is objected to, for the reason that if there be such a letter in existence, it must be shown to the witness before he is interrogated about it.

By Mr. TALBOTT:

Q. Mr. Kilgour, what was the first intimation that you had about a crime having been committed in the burning of this house? A. The first time I ever heard the fact that a crime had been committed was from Mr. Lipscomb, at this interview.

Q. Now, Mr. Kilgour, after being informed by Mr. Lipscomb that a crime had been committed, and that a client of his knew of the crime and was a particeps criminis, what did you do then with regard to investigating the crime?

Mr. DAVIS: Objected to upon the ground that there is nothing in the testimony of the witness indicating that any client of Mr. Lipscomb's was a particeps criminis, or represented by Mr. Lipscomb so to be.

A. I stated that I told Mr. Lipscomb I——

Q. I beg your pardon. I asked you what you did. A. After that?

Q. Yes; with regard to investigating the burning of this house? A. I made no investigation, but I wrote to Mr. Lipscomb if he had any testimony to send it up before the grand jury, and I would see that it was properly presented and considered.

Q. You were the State's Attorney at the time? A. I was.
159 Q. It was your duty to investigate crime, was it not? A. In a measure, yes.

Q. What do you mean by "in a measure"? A. Oh, well, according to my conceptions of duty, and the functions of my office.

Q. Was it your duty to investigate crime in Montgomery County, when you had reason to believe that a crime had been committed? A. It was my duty to investigate it, but I did not think it would be my duty to investigate any further with reference to the matter that Mr. Lipscomb referred to, nor did I. I had thoroughly inquired about it before that, and had done everything I could do and that could be done in reference to the matter.

Q. I am now asking you what you did. A. I say I did nothing after that.

Q. No, but what did you do before that? A. Well, I did what

people usually do. I inquired about it and talked with the authorities about it, and saw some people down there at the burned mills. I recollect having an interview. I wouldn't say with whom, though. I believe it was one or two people. I put myself in possession of all the tangible facts that were to be had at that time.

Q. You have stated in your affidavit that "In September of that year a fire occurred down near Four Corners, and a large and handsome dwelling house was destroyed. The fact was noted in
160 the papers at the time, and created much excitemnet, because of the expensive character of the house which had been burned." Now, did you not know at that time it was generally believed that this house had been burned? A. I did not. I didn't know it was generally believed, because there was no information there, and no information could be had upon that proposition.

Q. Then why did you begin to investigate it if you had no information, and there was none to be had? A. There was possibly a suspicion, but suspicion and belief are wholly two different things.

Q. I am aware of that, sir. A. Possibly.

Q. Did you write to any of the insurance companies? A. I did not, sir.

Q. Did you see any of the parties who had insured the building? A. I did not.

Q. Will you state who you did see in your investigations prior to your interview with Mr. Lipscomb? A. I cannot. I know that I talked with the authorities.

Q. What authorities? A. The sheriff, possibly.

Q. I ask you to tell me who you did talk with, Mr. Kilgour? A. I cannot. I understood that the house was not tenanted.
161 Now, I did talk; yes. I know there was nothing I could discover that I could get onto.

Q. You did not make any effort to discover it, did you? A. Oh, yes.

Q. What effort did you make? A. I can't tell you.

Q. Then as soon as Mr. Lipscomb told you of the fire, and that he had evidence that a crime had been committed in the burning of the house, that the witness he could produce was an accomplice, and that it was supposed the owners of the property had caused it to be set on fire and burned, you simply then told Mr. Lipscomb that a man had a right to burn his own house, and dropped the subject? A. I was not impressed at all, if you want the facts, with the strength of Mr. Lipscomb's statements, and any possibility of success from what he stated to me.

Q. Did you think Mr. Lipscomb was lying to you? A. I never thought of it in that connection.

Q. Well, if he was telling the truth, did you not think it worth while investigating, when a building worth $40,000 had been burned under suspicious circumstances in the county? A. He told me that the testimony on which he relied was that of an accomplice, whereupon I told him it was not sufficient, and he declined to give the name of him.

Q. Then you dropped the case? A. I did.

Q. You dropped the investigation? A. In view of the whole conversation and the general situation, I did drop it.

162 Q. I now read to you section 7 of the code, article 27, under the title "Arson."

"If any person shall wilfully and maliciously set fire to and burn any untenanted or unfinished dwelling house, whether the same be his own or the property of another, with intent thereby to injure or defraud any person, he shall, upon conviction thereof, be confined in the penitentiary for a term of not less than one nor more than ten years."

Did you examine that section of the Code when you came to the conclusion that the party could not be convicted? A. I did not.

Q. Then, without making any examination of the law, or conferring with anybody, you simply dismissed the matter from your mind and did nothing more. Is that right? A. I was familiar with——

Q. I am asking you, sir, whether you can answer that question. A. Read the question to me again.

Mr. Davis: The witness has the right to answer the question without interruption.

(The question was read by the examiner.)

A. I had ample and sufficient knowledge of the law and of the procedure to judge of the facts as given to me, and upon that knowledge I formed an opinion, and based my action accordingly.

Q. Were you familiar with Section 7, as read? A. Possibly I was.

Q. Were you? A. I can't say positively that I was, but I think in all probability I was.

Q. How long after you saw Mr. Lipscomb before you saw Mr. Pickford?

163 Mr. Davis: This is objected to, upon the ground that it is not cross examination.

A. Oh, I don't think I met Mr. Pickford until after these indictments. I met Mr. Pickford very recently.

Q. I am asking you the simple question: How long after your interview with Lipscomb before you saw Pickford?

Mr. Davis: I repeat my objection.

A. Before I saw Pickford?

Q. Yes. A. I can't tell. It must have been five or six years because I never met him, I don't think, until after these indictments were filed.

Q. Then you went to see him? A. I did not.

Q. Did you not go to his office? A. Go to Pickford's office?

Q. Yes; shortly after the indictments were found? A. I don't think that I did.

Q. Shortly prior to December 8, 1901, did you not call on Mr. Pickford? A. No; I don't think I did.

Q. Did you not call and get some money from him, Mr. Kilgour? A. Some money?

Q. Yes. A. No sir, Pickford never paid me a cent.

Q. Then if Mr. Pickford states that he paid you money about that time he is stating what is not true?

164 Mr. DAVIS: Objected to as not cross examination.

A. Mr. Pickford never paid me a cent of money. Walter and Bradshaw sent me $10 to Rockville one day. That is the only fee I ever had.

Q. Do you mean to say Mr. Pickford never paid you any money? A. No sir.

Q. Did he ever give you a check? A. No sir.

Q. Did you call on Mr. Pickford prior to December 8, 1901? A. I met Mr. Pickford at Mr. Walter's office.

Q. At his place of business? A. No sir; I never was in Mr. Pickford's place of business. Where do you mean; down there on the Avenue? and 7th Street? I never was there in my life.

Q. Did you state to him that you knew all about the case and that you sympathized with him in his trouble, and that it was a case of blackmailing?

Mr. DAVIS: Objected to as not cross examination.

A. I am not conscious of ever having made such a statement.

Q. Did you ever state to him that the whole thing had been brought to you and that you had pronounced it a case of blackmailing and kicked them out?

Mr. DAVIS: The same objection.

A. I may have stated to him the substance of my interview with Mr. Lipscomb. Possibly I did.

Q. When and where was that conversation? A. Well, I say I met Mr. Pickford in Mr. Walter's office once.

165 Q. When was that? A. I can't say; and that was casually. I think I was talking with Walter on F Street. Let's see. I had a talk with him casually once.

Q. What did you go to Walter about, and when was it, Mr. Kilgour? You have not stated when. A. I don't know. Walter had an office on F Street there. I have seen him lots of times. I don't know when it was.

Q. What did you go to see him for? A. I didn't go to see him for anything special. His office was right there on F Street, where I passed every time I went to Washington.

Q. What did you go in for that day, Mr. Kilgour? A. I don't know. I will tell you what I went to see Walter for; about this fellow that sent word to me to represent him in Rockville.

Q. Shaw? A. Yes, about that time.

Q. Did Shaw send you word, or did Pickford engage you to represent Shaw? A. I don't recall.

Q. Is it not a fact that Pickford engaged you to represent Shaw, and did you? A. Pickford never paid me any money, as I tell you. The first intimation I had of Shaw—now I recall it Mr. Baden came to me in Rockville and handed me $10 to represent this fellow there.

166 Q. Did not Mr. Pickford engage you to represent Shaw and pay you $20? A. No sir.

Q. Did Mr. Pickford ever pay you $20 at any time? A. It occurred right down in front of the hotel in Rockville.

Q. Did Mr. Pickford ever pay you $20? A. No sir.

Q. Then I understand you, Mr. Kilgour, to state that you never called on Mr. Pickford at his office? A. I wouldn't say. Did he have an office with Walter?

Q. I don't know. No; he did not. A. I saw Mr. Pickford in Mr. Walter's office.

Q. Pickford testified you called on him at Pickford's place of business. A. I never was in Mr. Pickford's place of business.

Q. Then when you stated in your testimony at the trial of the case that you called at Mr. Pickford's office subsequent to the return of the indictment, you were mistaken then or you are mistaken now. Am I right? A. I have not stated in my testimony that I called at his office.

Q. On the contrary, you have stated that you did not call at his office? A. I did not. I said I called at Mr. Walter's office and saw Mr. Pickford there. Whether he has an office there or not, I don't know.

Q. He has not, I will inform you. A. That is where
167 I saw him.

Q. You stated in the trial of the case of Talbott against Pickford that you called at Pickford's office subsequent to the return of this indictment. In your testimony now you state that you did not call at Pickford's office or place of business. Which is correct? A. I have not stated that I did not call at Mr. Pickford's office. I was at Mr. Walter's office. I saw Mr. Pickford there, and I don't know whether I testified in the case you refer to that I called there or not.

Q. You have just stated that you did not call at Mr. Pickford's office, and in the trial of the case of Talbott against Pickford you stated that you did call at his office after the indictment. What is correct? A. I state right now that I saw Mr. Pickford at Mr. Walter's office. He may have had an office there. I saw him there.

Q. Did you call at Mr. Pickford's office, not Mr. Walter's? A. I suppose I considered it Mr. Pickford's office, if I said that. I don't know where Mr. Pickford's office was.

Q. Mr. Pickford's place of business and his office was near the corner of 9th street and Louisiana Avenue. A. Well, sir, I never called there, and I never meant to say I ever did.

Q. Then you were mistaken when you stated that you called at his office? A. I was not.

168 Q. What was your object in going to see Mr. Pickford that day? A. I didn't say I went to see Mr. Pickford.

Q. Did you go to see him? A. Yes, I did go to see Mr. Pickford once in reference to this man that I represented. I saw Mr. Pickford at Walter's office. That is the only place I did see him. I did go into his office then.

Q. Did he employ you then to defend Shaw? A. I think possibly he did. Yes; he did mention it to me.

Q. At Walter's office? A. Yes; I recall it now. He did.

Q. Did he pay you a fee? A. No; he didn't pay me a fee. As I say, subsequently Baden brought me $10 in Rockville, I recall.

Q. Who did Baden say the money was from? A. I don't remember.

Q. Baden had no connection with the case, had he? A. Mr. Pickford intended me to represent this man. I remember it now.

Q. Is your recollection as varied as your testimony, and can you not get at least one thing straight? A. I recall it now. I can't be supposed to talk about a thousand foreign and extraneous matters.

Q. Did you not get $20 from Pickford as a retainer in the Shaw case? A. No sir, I did not.

169 Q. How much did you get from him? A. Mr. Baden brought me $10, as I tell you, one day in Rockville, to look after this case

Q. You have said that, Mr. Kilgour. A. I say that again. I will answe- that question twenty times.

Q. Is that all the money you received? A. I have said so a half a dozen times.

Q. You say so now. A. I say so now.

Q. Now, I want to ask you, Mr. Kilgour, did you in this conversation in which you were -tained to defend Shaw, state to him that the whole thing was a blackmailing scheme?

Mr. DAVIS: Objected to, as this question has already been twice asked and answered.

A. I say I don't recall ever mentioning a blackmailing scheme.

Q. That is not the question. I ask you whether in this conversation in which Pickford retained you to defend Shaw, you did not tell him that the whole thing was a blackmailing scheme? A. I don't remember that I told him so. I don't remember what happened. I don't remember the conversation. I don't remember what was said.

Q. Where was this conversation in which you say you told Pickford it was a blackmailing scheme on the part of the insurance companies?

Mr. DAVIS: I object, because the witness has already said he did not say it. He has said that over and again.

170 By Mr. TALBOTT:

Q. To whom did you say that you considered it was a scheme on the part of the insurance companies to use the State's Attorney's office? A. I don't know that I ever said that. I don't recall that.

Q. You testified to that in the trial, did you not? A. I don't think I did.

MR. MADDOX: If you have it there, read it.

Mr. TALBOTT: I will read it.

"In discussing the matter when it was brought to my attention

officially, I considered it. I considered it was a scheme on the part of the insurance companies to use the State's Attorney's office."

Then he was interrupted by Mr. Mitchell.

Mr. MADDOX: He said "considered it was." He did not say it was.

By Mr. TALBOTT:

Q. You said: "In discussing the matter." With whom did you discuss that matter? With whom were you discussing the matter when you said you considered it a part of the scheme of the insurance companies to use the State's Attorney's Office? I am using the exact language here. A. You are not using the exact language.

Q. You can come and read it yourself.

"In discussing the matter it was brought to my attention officially, I considered it."

A. That is right. I considered it. If you want to know what I think about it, I will tell you.

Q. I am not asking that now. I am asking who you were
171 discussing that matter officially with? A. I discussed it with Mr. Lipscomb.

Q. Was he the only man you discussed it with? A. The only man.

Q. And after the conversation with Lipscomb, in which you were informed that a crime had been committed in the burning of this house, you took absolutely no other steps to learn whether or not a crime had been committed. Is that correct? A. I did take other steps. As I said, I wrote to Mr. Lipscomb if he had any other evidence, to send it up to me, and I would present it to the proper authorities.

Q. Aside from your connection—— A. Aside from that, I did nothing further.

Q. You had no communication with any of the insurance companies? A. I have said that two or three times.

Q. In your conversation with Mr. Lipscomb, was Mr. Talbott's name mentioned? A. No, I don't think it was.

Q. What was the exact language used with reference to the disposition of the money, in the event the insurance companies should recover it? Now, I am asking you for the exact language? A. I can't give the exact language.

Q. Give it as nearly as you can. A. I gave that in my examination in chief—the general proposition, his general statement of the
facts, and saying that he was either the attorney or controlled
172 the insurance companies; that they did not want any of the money.

Q. Did he offer to give you any of that money, and if so, give the exact language that he used. A. No sir; I cannot say that he did use any words. I say it was a question of inference wholly, so far as my memory goes now.

Q. Did it not strike you as being a remarkable combination of circumstances, to have a crime committed in Montgomery County, and a Washington lawyer being employed by the insurance companies, who were the sufferers by this fire, and the officials of Mont-

gomery County, whose duty it was to look after such matters to be completely ignored by the parties? A. He was not ignored. He was informed emphatically that if he had any testimony, to bring it up before the grand jury.

Mr. TALBOTT: He does not understand the question.

Mr. DAVIS: I confess I don't understand it.

Mr. TALBOTT: I can furnish the usual amount of understanding, Mr. Davis.

Mr. DAVIS: I doubt it very seriously. I object to this question as assuming a hypothesis contrary to the fact, the witness having already testified that he, the official of all officials of Montgomery County concerned in the matter, being the person with whom the conversation deposed to by him, was being had.

By Mr. TALBOTT:

Q. Mr. Kilgour, did it not strike you as being remarkable that the insurance companies, who were the losers by the fire, to the extent of $21,000, $22,000 or $23,000, as your varying recollection
173 would indicate, should be so vicious in their feelings towards the perpetrators of the crime, as alleged, as to be willing to put up all the money and give it back, and yet they would make their approach to that end by way of a Washington lawyer, making a proposition of blackmail to the officials of Montgomery County? A. I can't understand the question.

Q. Did it not occur to you—— A. Let me answer.

Q. You will answer it just as well without understanding. Go ahead. A. I say I can't understand the question, but I will answer it the best I can, and that is this, that I was not by any means flattered at his proposition, and I did not have faith and confidence in it, and I thought there was something behind it that ought not to be.

Q. Then if you had had faith and confidence in his ability to have carried it through——

Mr. MADDOX: It was not his faith and confidence in his ability to carry it through. It was in his proposition.

Mr. RIDOUT: Don't interrupt in the midst of a question.

Mr. MADDOX: But he was not stating it right.

By Mr. TALBOTT:

Q. Then if you had had faith and confidence in his ability to have carried it through, you would have listened to the proposition as detailed by Mr. Lipscomb? A. I listened to it thoroughly, and I told him everything with reference to it that it was necessary to tell him.

174 Q. How much money, since these indictments were framed, have you received from Thomas H. Pickford, directly or indirectly, with knowledge that it came from Mr. Pickford? A. I never received but ten dollars in the matter, and that was from Mr. Baden, and I suppose Mr. Pickford sent it to me.

Q. Did you not at one time get $20 from Mr. Pickford? A. No sir; I told you that.

Q. How much have you gotten from Pickford since this suit was filed? A. I never have gotten a cent from Pickford or anybody else.

Q. Directly or indirectly? A. No sir.

Q. Have you gotten any fees for doing any work from Mr. Pickford? A. No sir, I have not.

Q. Were you paid for making this affidavit? A. No sir, I was not.

Q. I want to know, Mr. Kilgour, the whole circumstances under which this affidavit was had. Who asked you for it, and when? A. Mr. Pickford's attorney asked me for it.

Q. When? A. Sometime about the time it was prepared.

Q. Who prepared it? A. It was prepared down in Mr. Maddox's office.

175 Q. Who did it? A. The typewriter there, the stenographer.

Q. Who dictated it? A. Well, I prepared some of it. Mr. Maddox prepared the affidavit most of it, after talking with me.

Q. How much of it did you prepare? A. In fact, all of it. I adopted it. Mr. Maddox of course did the mechanical part of it, or his typewriter did.

Q. Mr. Kilgour, let me ask you if Mr. Talbott ever conferred with you about any case after he was State's Attorney? A. I don't think so, sir, possibly he may have. I don't know.

Q. No; not if I knew it. Why did you put in that affidavit, "that the said Talbott did not confer with me at all about the matter, or ask whether or not the fire had ever been brought to my attention, or that a possible crime had been connected with it? A. Just because it was a fact.

Q. Who suggested that you put that in? A. Nobody that I know of.

Q. Did you put that in of your own motion? A. No sir; it was the result of our talk about the matter. I did not consider it of any importance and materiality at all.

Q. You had no object in putting it in? A. I didn't know you in the matter, and didn't have anything to say to you about it.

Q. Who suggested that that be put in? A. I don't know.

176 Q. Did Mr. Maddox? A. I don't know that he did. I think Mr. Maddox possibly had an idea that I had talked with you. I don't know anything about it. It is there as it is, and it is a fact. That is why I put it there.

Q. It is also a fact that you were sober yesterday, is it not? A I hope so.

Q. Why didn't you put that in?

Mr. DAVIS: I object to this as scandalous and as irrelevant and immaterial.

Mr. TALBOTT: You can cut that out, if the counsel objects to it.

Mr. DAVIS: I want it to stay in.

Mr. TALBOTT: All right, we will gratify you. Anything else you want to stay in, we will put it in for you.

By Mr. TALBOTT:

Q. There were quite a number of other facts in connection with this transaction that you could have put in, too, which would have been true, were there not?

Mr. DAVIS: We object to this line of examination, on the ground that it is a useless waste of time and money, the facts abundantly appearing from the deposition of the witness that the affidavit about which he is inquiring was prepared after a consultation with one of the counsel for complainant, who deemed the affidavit to be a proper one for filing in the case; and the inquiry about these irrelevant matters is wholly gratuitous and unnecessary. Notice is given that a motion will be made to tax the costs of this line of inquiry
177 upon the defendants, without regard to the result of this litigation.

By Mr. TALBOTT:

Q. You were State's Attorney for four years, were you not? A. Yes sir.

Q. Was it the custom for the incoming State's Attorney to confer with the outgoing State's Attorney about matters with which the outgoing State's Attorney had absolutely nothing to do? A. I don't know anything about the custom.

Q. Did you ever, as State's Attorney, confer with your predecessor about such matters? A. I suppose so. I don't know.

Q. Can you recollect? A. I can't recall any.

Q. Can you recall one instance in which you conferred with your predecessor about a matter of that character? A. At this time I cannot.

Q. You state in this affidavit:

"I will state further that the testimony upon which Mr. Lipscomb, in these conversations, seemed to rely to fasten this crime upon the people whom he had in his mind, was the admission of an accomplice made to a third person."

Then you follow with this:

"Under the practice in Maryland, the State's Attorney is the adviser of the grand jury, and appears before them in the investigation of cases whenever he desires."

I want to ask you if the latter part of that is true? A. Whenever he desires?

178 Q. Yes. A. It has always been true with me when I was State's Attorney.

Q. Don't you know that that is absolutely false? A. No sir, I do not.

Q. Don't you know that neither the State's Attorney, nor anybody else, from theChief Justice of this State down, has any right to go in a grand jury room unless he is invited there by the grand jury? A. I do not.

Q. Do you mean to say, Mr. Kilgour, that a State's Attorney has the right to go in the grand jury room without the invitation of the grand jury? A. He has the right to go in there unless the

grand jury objects to his presence. If they object, then he has not the right. If they don't object, it is customary at all times that he does it.

Q. Mr. Kilgour, you have added to this:

"and exercises great influence over that body, and if he should advise action, even upon such testimony as that proposed by Lipscomb, an indictment would undoubtedly follow, especially when the public mind was excited over an alleged crime of such enormity as arson."

Don't you know as a matter of law that the only duty of a State's Attorney with reference to a grand jury is to come into the grand jury room at and upon the invitation of the members of the grand jury, and he is held strictly to but one line, and that to ad-
179 vise upon the law of the case? A. Yes sir, that is true.

Q. And don't you know that it would be not only highly improper, but subject him to the penalties of the court, if he undertook in any way either to advise or suggest, directly or indirectly, in any manner, or attempt to influence the grand jury, in procuring an indictment for any crime? A. I can't answer that question so quickly. It will have to be read over.

(The question was read by the examiner.)

A. He has no right to do it corruptly. Of course not.

Q. Has the State's Attorney any right to influence, in any manner, or for any motive, even in the slightest degree, the action of a grand jury in procuring an indictment? A. Well, there are various ways to influence a person. You can influence them without doing it corruptly—giving them advice in good faith. You can influence them. I have known them to be influenced. They solicit your advice and they are governed to a large extent by any advice which the State's Attorney gives them.

Q. Don't you know as a matter of law that the only advice which the State's Attorney can give them or that they can receive is the advice as to the law of the case, and not as to the facts. A. Under the law the State's Attorney is the adviser of the grand jury.

Q. The adviser as to what? A. As to the law, and the bearing of the facts upon propositions which come before them, of course.

Q. Then why, if this be the case, did you put into this affi-
180 davit the intimation that the State's Attorney in the Pickford case influenced the action of the grand jury? A. I didn't put any such intimation in there, and the affidavit does not bear such an interpretation.

Q. Who suggested the putting in of that latter clause in the affidavit? A. I don't know. We were talking over it. We were talking over the action of grand juries generally, incidentally.

Q. I want to know who suggested putting in that latter clause in that affidavit. A. I don't know. I was writing that affidavit, or dictating it there. I think I was dictating, talking to the stenographer, and that idea was in my mind in reference to the official duties of the State's Attorney.

Q. Did you ever influence—— A. I had not then in my mind any corrupt influences.

Q. And yet you have put in here: "And exercises great influence with that body, and if he should advise action, even upon such testimony as that proposed by said Lipscomb, an indictment would undoubtedly follow." A. Beyond all question, the grand jury would not know the rules of evidence, and if a State's attorney would go before them with testimony that was inadmissible and ineffective for the purpose for which it was offered to the grand jury, they would not do it. I could go before the grand jury as State's Attorney and tell them, "Here is certain evidence that would be admissible in the court above" and beyond all question they would be influ-
181 enced by my statement, and they would act upon it, because they would know, or believe, at least, that I knew the law in reference to the matter, and they did not.

Q. Did you ever, as State's Attorney, use any influence of that character with the grand jury? A. No; I hope not.

Q. What services did you render, Mr. Kilgour, for the $10. A. I appeared in the case and made an effort to have it stetted. I made a motion before the Court, Judge Henderson, that it should be stetted, and he pertinently replied, "Let the fellow come into court if he wants to answer the indictment," and he wouldn't take any action in reference to it until he did.

Q. Did Shaw ever come into court and stand trial? A. No sir; my client did not, if it was Shaw.

Q. Did you ever see Shaw? A. No, I did not.

Q. Where did you get your information as to Shaw's connection with this case? A. I say I got it from Mr. Walter's office; and since you have been reading me the testimony there and asking me those questions, I recall I saw Mr. Pickford down there at that office, as I testified in the case.

Q. No; you did not testify to that in that case. A. I say I did. I told it there in court, and you have been reading from it.

Q. Who told you Shaw's version of this case? A. I never had Shaw's version of that case.

182 Q. Did you ever talk with anybody about Shaw's connection with the burning? A. I don't know whether he was connected with it. It seems to me he was.

Q. That is not the question at all. You might as well answer it. Did you ever talk with either Walter or Pickford about Shaw's connection with it? You got a fee for defending him. A. I told you I talked with them there in the office.

Q. What was said by them, and who said it? A. Well, now, I can't say, to save my life.

Q. They asked you to take charge of Shaw's case, did they not? A. Yes sir; I say that they did.

Q. Was that money or a check that was handed to you by Baden? A. It was money. Nothing was said about the fee, that I recall. I remember that, though.

Q. Did you give him a receipt for it? A. No sir.

Q. I would like to know the first time you ever met Hudson? A.

Well, I couldn't tell you. I will tell you the first time where I ever saw him.

Q. Well? A. Coming right in the door of the court house at Rockville, when these cases were on trial there, in which Mr. Maddox and others appeared?

Q. When was that? A. I don't know.

183 Q. Mr. Lipscomb never told you who the man was who wanted to get immunity, and you never granted him any? A. No sir; I told him I had no authority to do it.

Q. And you never wrote any letter? A. No sir; I never did, because I had no authority, and I told him that distinctly, I remember.

ALEXANDER KILGOUR.

Subscribed and sworn to before me this 25th day of October, A. D. 1909.

JOHN W. HULSE.
Examiner in Chancery.

184 JAMES B. HENDERSON, a witness of lawful age, produced by and on behalf of the complainant, being first duly sworn, is examined—

By Mr. DAVIS:

Q. Judge, kindly state your name, residence and occupation? A. James B. Henderson; Rockville, Maryland; and I am one of the associate judges of the 6th Judicial Circuit of Maryland.

Q. How long have you held that position? A. Nearly fifteen years.

Q. Prior to becoming a judge, how long were you a member of the bar? A. About 27 years.

Q. Do you know the defendant, Henry Maurice Talbott, and if so, how long have you known him? A. I have known Mr. Talbott probably twenty years.

Q. Do you recall the indictment of one Pickford and others in the Circuit Court of Montgomery County, Maryland, in respect of a fire that occurred in that county in the fall of 1897? A. Yes; there was such an indictment found by the grand jury in the March term of court, 1901.

Mr. TALBOTT: You mean 1898, don't you?

A. No; 1901.

Mr. DAVIS: The indictment was found in March, 1901.

185 By Mr. DAVIS:

Q. Do you remember the years during which Mr. Talbott was State's Attorney of Montgomery County? It is of record that he assumed office in 1900? A. Yes; he was elected in the fall of 1899, assumed office in January, 1900, and continued in office for four years.

Q. So that at the time of this indictment he was State's Attorney for Montgomery County? A. He was.

Q. State, if you please, whether during Mr. Talbott's term of office as State's Attorney, you had any conversation with him in relation to that fire, and the indictment that was brought in relation thereto? A. Before or after the indictment?

Q. Either. Did you have any conversation with him before the indictment? A. I don't recall any special conversation before the indictment.

Q. Did you have any conversation with him after the indictment? A. I do remember having one, and probably more conversations with him after the indictment, and after Justice Bradley, of the Supreme Court of the District of Columbia, had disposed of the habeas corpus case there. Mr. Talbott, after the disposition of the habeas corpus case, came to see me probably several times, and asked me to suggest some means by which the defendants other than Pickford,
186 who had already given bail, could be brought within the jurisdiction of the court. I told him I could make no suggestion; that the only recourse would be to secure a requisition, and that had been tried, and Judge Bradley had released the defendants under habeas corpus proceeding. In one of these conversations I added that I had myself examined somewhat the question that had been passed upon by Judge Bradley in disposing of the habeas corpus case, namely, the validity of the indictment, a question as to whether or not it charged any offense under the law of Maryland, and had reached the same conclusion that Justice Bradley had, and I thought it was scarcely worth while for him to pursue these prosecutions any further. Mr. Talbott dissented from this interpretation of the law, and contended that it was sufficient to charge the offense in the words of the indictment, and then any evidence of corrupt motive could be adduced in support of the indictment at the trial. He stated that he was especially interested in convicting these defendants, because he believed that the insurance companies who had paid the insurance money after the fire had been defrauded; that he represented these insurance companies, and that if the defendants were convicted, it was probable the companies could recover the money that they had paid after the fire; that a large fee was involved in the matter. I understood him to say that in the event of success in the recovery, the fee would amount to about $11,000. He said also that he wished, at least, to retain the case on the docket, because he had every reason to believe that if Mr. Shaw, one of the defendants, were brought
187 within the jurisdiction of the court, he would confess and turn State's evidence.

Mr. TALBOTT: I note an exception.

By Mr. DAVIS:

Q. Did he or not state who would be the recipient of this fee of $11,000? A. He did not. He said "We"—that is, according to my recollection—"We represent the insurance companies who have paid this money." He did not say who constituted the "we."

Q. As a matter of fact, within your knowledge, did or did not Mr. Talbott dismiss these prosecutions of his own volition or otherwise?

Mr. RIDOUT: Objected to on the ground that the records of the Court of Montgomery County will speak for themselves on that subject.

A. My recollection is that in the November term of Court, Mr. Pickford offered ready for trial, and after considerable discussion, Mr. Talbott wished to secure further time. I think the Court announced that he would have to try the case or enter a nolle, and he then nolled the case so far as Pickford was concerned.

Q. Do you or not recollect what became of the indictment as to the other defendants? A. The same action was taken with reference to Walter, and has been recently taken with reference to Bradshaw. The indictment now stands against Shaw.

188 Mr. RIDOUT: So far as the testimony relates to recent action, obviously by some other representative of the State than Talbott, it is objected to as immaterial.

By Mr. DAVIS:

Q. When, if you remember, did you state any part of what you have deposed to to any counsel for Mr. Pickford or any of the other parties to the indictment? A. I may have mentioned the matter to one or two members of the bar, but I have no distinct recollection of it now, and then, if I did, I told them to say nothing about it.

Q. Without regard to the date, do you remember the occasion on which you first mentioned the matter to any of the counsel connected with the cases in behalf of any of the defendants to that indictment? A. I mentioned the matter to Mr. Henry E. Davis, who, as I understand, is counsel for the defendant Pickford, on the evening of Christmas Day, in the year 1908.

Q. Did you or not at that time know that the Supreme Court of the United States had finally passed upon the libel suit that has been brought in the City of Washington?

Mr. RIDOUT: Objected to as immaterial.

A. Yes sir; I had been informed that the Supreme Court of the United States had sustained the judgment of the Court of Appeals of the District of Columbia, which had sustained the judgment of the Supreme Court of the District, and I supposed at that time the litigation in the matter was at an end, or I should never have mentioned the matter to Mr. Davis.

189 Cross-examination.

By Mr. RIDOUT:

Q. Judge, I suppose you made no special effort to carry in your memory the circumstances concerning which you have testified? A. None at all.

Q. Are you positive before the indictments were found by the grand jury you had no consultation with Mr. Talbott in respect to the form of the indictment? A. No; I would not say that I did not have any consultation with him at all. I don't recall any.

Q. Let me see if I can refresh your memory. Is it not a fact that

after a conference between you and him, you either suggested or assented to his suggestion that the indictment would be good under section 7, article 27, of the Code, under the title "Arson"? A. I think not.

Q. Are you positive you did not say so? A. Yes; I can say that I am positive that I never stated before the indictment that the indictment could be drawn under that act.

Q. Do you recall whether or not Mr. Talbott, before the indictment was found, showed you a paper purporting to be written confession of Hudson? A. I recall that he showed me a paper, but I don't remember that it was before the indictment was found. My recollection is that it was after the indictment.

190 Q. What was that paper? A. You can amend that answer by saying "such a paper."

Q. Unless that paper had created the impression in your mind that there was justifiable ground for the action of the grand jury, would you have suggested the propriety of entering a nolle pros, or not proceeding under the indictment, because of the insufficiency of the evidence?

Mr. DAVIS: Objected to as hypothetical and as calling for an answer upon the assumption of an unestablished fact, and further, because the witness has testified that according to his impression, such a paper as is inquired of was not shown to him before, but was shown to him after the indictment.

A. My recollection is that no such paper was shown to me before the indictment, nor do I think that Mr. Talbott had any consultation with me about the indictment prior to its being returned by the grand jury.

Q. You do, however, recollect that either before or after the finding of the indictment a paper purporting to be a confession of Hudson was shown you by Mr. Talbott? A. I recall the fact that such a paper was shown me.

Q. And after having read that paper, you did not exercise your judicial authority to prevent the proceeding under the indictment, did you? A. No; I did not.

Q. Would you not have done so had you believed that the evidence thus presented was totally insufficient? A. If the paper had been shown me before the indictment, do you mean?

Q. No sir. What I mean is, assume that after the in-

191 dictment a paper, said to be the main support of that indictment, or to embody the main evidence in support of that indictment, was shown you; would you not have interposed to prevent requisition proceedings and other proceedings under the indictment if you had believed that on the face of that confession the evidence was insufficient? A. After the indictment had been found, I had nothing to do, either with the further prosecution of it or the requisition.

Q. May I ask you this question: If an indictment had been found, and it came to your knowledge that through what might have been an error of the grand jury in the weighing of testimony, it was ap-

parent that there was no case for the state, would you — stood by and permitted requisition papers to be issued in such case? A. As I have said, I have nothing to do with preparing requisition papers, and I have never conceived it as a part of my duty to prevent the State's Attorney taking such action as he thought proper with reference to a requisition, after an indictment had been found.

Q. Do you remember the late Richard Poole? You were acquainted with him, were you not? A. Oh, yes.

Q. Do you recall whether he and at least one other member, or two other members, of the grand jury, did not call upon you and confer about the indictment of these people? A. I have no such recollection.

192 Q. Do you say it did not occur? A. As far as I am advised now, I say positively that no such conversation occurred, because if my advice had been requested, I would have advised the grand jury that they could not find an indictment upon the evidence of Hudson alone.

Q. Then you are positive that you never were consulted by any member of the grand jury? A. Yes.

Q. And never by Talbott as to the sufficiency of the evidence before the indictment? A. I am very sure of that.

Q. Nor with reference to the form of the indictment? A. I am very sure of that also.

Q. Was any inquiry made of you by anybody purporting to be counsel for Pickford and Walter prior to the day before Christmas, 1908, concerning your knowledge of the attendant circumstances upon the indictment of Pickford and Walter? A. None whatever.

Q. Where were you when you made the statement of Christmas Eve, of December, 1908, to Mr. Davis? A. At the railroad station of the Baltimore & Ohio Railroad Company, at Rockville.

Q. What led to your making that statement to him? A. I had gone out in the evening for a walk, and got as far as the railroad station, and there accidentally met Mr. Davis. For want of something else to talk about, I think during the course of the conversation I asked him whether the judgment of Mr. Talbott against

193 Pickford had been paid? He said no; that some question had arisen about the division of the judgment, and it had been held up until that question could be settled.

Q. What was your motive in making the statement to him which you say you did make? A. I had no specific purpose whatever. I had been impressed by the fact that Mr. Talbott had, in his suit against Pickford, recovered a sum which was substantially equivalent to what his fee might have been had he recovered the claims for the insurance company, and I thought he had been particularly fortunate; and that impression had been made on my mind when I heard the result of the case, and I suppose it contained there.

Q. I assume from your last answer that the statement which you have testified was, in substance, made by Mr. Talbott, conveyed no idea of impropriety to your mind? A. Well, I have not said that, and I have not said anything from which that could be inferred.

Q. Your testimony shows that you maintained silence on the sub-

ject up to December, 1908? A. I did, unless, as I have said, I may have mentioned the matter to one or two members of the bar, with the injunction of secrecy.

Q. What was your motive for that injunction of secrecy? A. Because I was a judge of the court in Rockville. Mr. Talbott was a member of the bar. I was brought in contact with him almost daily in matters of business, and I did not care to do anything that would incur his enmity.

Q. You took no action in your judicial capacity in the
194 matter, did you? A. No sir.

Q. You did not feel, did you, that it called for any judicial action on your part? A. I did not.

Q. Judge, was not the first time that there was any judicial decision on the subject of the sufficiency of an indictment phrased as the indictments in question were a decision in the Frederick Circuit Court, after the finding of these indictments? A. My recollection is that a somewhat analogous question came up in the trial of a cause in the circuit court of Frederick County, but that it was after this indictment. There is a case reported in 4 Gill & Johnson, the case of Jones *vs.* Hungerford, which is a slander case, in which the court held the charge that the defendant had burned a school house was a crime per se, if it was the property of another, which is a sort of judicial interpretation of that act. That I had seen before I reached the conclusion which accorded with that of Justice Bradley.

Q. You took part, did you not, in the decision in the Frederick Circuit? A. Yes sir.

Q. Do you recall whether the language of that indictment was precisely similar to the indictments in question here? A. I do not. My recollection is, however, that it was substantially similar.

Q. Do you recall who prepared it? I mean who was then
195 State's Attorney in the Frederick Court? A. I do not, unless it was Judge Worthington.

Q. Judge Worthington is now Chief Judge of the Court of Appeals of the State of Maryland, is he not? A. Yes; but I am not sure of that. Yes, it was probably Judge Worthington. He was elected in the fall of 1899.

Q. About what time, compared with these indictments, was that indictment found, if you remember? A. Oh, I don't remember now how long after this indictment; my recollection is that it was within a year or eighteen months, at the outside.

Q. Before these indictments or after these indictments? A. After.

Q. Judge, would you say that your recollection of the conversation to which you have especially referred with Mr. Talbott was clear and positive? A. Yes; I have a very definite recollection of the conversation. I was especially impressed with the amount of the fee that was involved in the transaction. I could not have imagined that.

Q. And from the time of that conversation down to December, 1908, with the exception of such conversations as you may have had with one or two members of the Rockville bar, you made no allusion to your conversation with Mr. Talbott, and took no action respecting

the information obtained from that conversation? A. None whatever.

196 Q. Judge, do you remember at what term these indictments were found? A. The indictments under question now? There was but one indictment.

Q. But one indictment against these three men? A. Four men.

Q. At what term was that filed? A. The March term, 1901.

Q. The only one of those men who came here voluntarily was Mr. Pickford, as I recollect? A. Walter afterwards came up.

Q. When did he come, compared with Pickford? A. Pickford came up at the March term, and Walter, I think, came up at the March term of the ensuing year. I am not sure. It was either at the November term, 1901, or the March term, 1902.

Q. As I recall your testimony, the requisition proceedings having failed, the only defendant who could have been tried at the November term was Pickford? A. Yes, unless Walter voluntarily appeared at that term.

Q. Then only those two could have been tried, assuming that the others did not voluntarily appear? A. That is the fact.

Q. Now, after the expiration of the March term, when was the next available criminal term? A. To what March term do you refer?

Q. Any March term. A. The November term.

197 Q. Of 1901? A. Yes.

Q. Under the practice established in your court, or the court under your administration of the judicial office, is it usual, where four men are indicted, and only two have been subjected or have subjected themselves to trial, to proceed in what might be termed a fragmentary manner; or is not the practice to wait at least a reasonable time, with a view to ascertaining whether the attendance of the other two defendants may not be obtained?

Mr. DAVIS: This question is objected to as irrelevant and immaterial, for the reason that the witness has testified, and it is otherwise established beyond doubt in this case, that without regard to any such practice as is assumed in the question, the trial of the defendant Pickford was actually set for a day at which he alone was present, and at which his trial was in course.

A. That depends upon circumstances. If there is any good reason why they should be tried together and not tried separately, the practice is to wait a reasonable time to secure the arrest of the other defendants. In this case it had been made manifest that the attendance of the other defendants could not be secured, and the Court was of the opinion that there was nothing in the indictment, and therefore it is very likely to be insisted that so far as Pickford was concerned the case should be disposed of.

Q. Where, as in this case, the testimony concerning one defendant would have been identical with that concerning all, there
198 would have been strong reason, would there not, if there were no other objection to that course, for waiting the reasonable time to which you have referred? A. Oh, yes; if the Court had been satisfied that there was any substantial offense charged in the in-

dictment, under those circumstances we would have waited a reasonable time.

Q. Of course if these men, other than Pickford and Walter, had been found by an alert sheriff within the boundaries of the State of Maryland, there would have been no difficulty about their arrest and production here, would there? A. I imagine none.

Redirect examination.

By Mr. DAVIS:

Q. Judge, do you recall whether or not in the conversation between Mr. Talbott, and yourself, in which you spoke of your concurrence with the view of Mr. Justice Bradley, you made reference to the case of Jones vs. Hungerford, of which you have spoken? A. I don't think I did. I don't think I called his attention to that case. I had been advised of the ground on which Justice Bradley based his decision, and I thought the reason he gave for his decision was a good one.

Q. Perhaps it may refresh your recollection if I ask you, as I do, whether you do not recall that in the conversation with me
199 at the railroad station in Rockville, you cited to me the case of Jones vs. Hungerford, and said that you had also cited it to Mr. Talbott in that conversation with him.

Mr. RIDOUT: Objected to as an attempt to fortify the testimony of the witness.

A. I don't recall the fact of having even referred to that decision in my conversation with you.

(Signature of witness waived, by agreement of counsel.)

(The further taking of these depositions was thereupon adjourned until Friday, October 22, 1909, at 2 o'clock p. m.)

200 *Depositions on Behalf of Defendants.*

Filed February 1, 1910.

In the Supreme Court of the District of Columbia.

* * * * * * *

Met, pursuant to agreement, at the offices of John Ridout, Esq., Fendall Building, corner D—and John Marshall Place, on Wednesday, November 10th, 1909, at 3 o'clock P. M., to commence the taking of testimony on behalf of the defendant in the above entitled cause.

Present: Samuel Maddox, Esq., of Counsel for the complainant, and

John Ridout, Esq., counsel for the defendant, Talbott.

Whereupon HENRY MAURICE TALBOTT, the defendant, being first duly sworn according to law, to speak the truth, the whole truth and nothing but the truth relating to the cause at issue, was examined and testified as follows:

Mr. MADDOX: Please note on the record that Mr. Henry E. Davis is confined to his house by sickness to-day, and cannot be present at this session, and the right to cross-examine this witness is reserved until Mr. Davis can attend.

Mr. RIDOUT: Counsel for the defendant, Henry Maurice Talbott has no objection to, and is also willing, that Mr. Maddox may defer his cross examination until this testimony is written out if he so desires.

201 Direct examination:

By Mr. RIDOUT:

Q. State your name? A. Henry Maurice Talbott.

Q. Mr. Talbott, you are one of the defendants in this case? A. I am.

Q. Mr. Talbott, you heard Judge Henderson testify, and have since read his testimony, have you not? A. I have heard him testify, and have since read his testimony.

Q. Please state whether or not, at any time or place, you ever made the statements to him which he attributes to you in his testimony? A. No, sir, I did not.

Q. Do you know Mr. Andrew A. Lipscomb, Mr. Talbott? A. I do.

Q. I wish you would please state what, if any, arrangement, or agreement, direct, or indirect, express or implied, you ever had, or now have, with Mr. Lipscomb, with respect to the collection of money for the benefit of the insurance companies, or any one of them, who are concerned in the loss by reason of the fire which is referred to in this proceeding? A. I never had any arrangement with Mr. Lipscomb, nor have I now, looking to the collection of any of the money paid by any of the insurance companies.

Q. What, if any, arrangement have you with him? A. I have not finished my answer.

Q. Go on Mr. Talbott?

202 WITNESS, continuing: Nor was the subject ever mentioned by either of us to the other.

Q. Now, Mr. Talbott, what, if any, arrangement, or agreement, express, or implied, have you ever had, or have you now, with the said insurance companies, or any of them, or any one on their behalf, or on behalf of any one of them, for any fee, or for any action to be taken by you, either officially, or individually, in the interest of those companies, or any one of them, or for any other purpose? A. Absolutely none.

H. MAURICE TALBOTT.

Mr. MADDOX: I reserve our cross examination of this witness until Mr. Davis can be present.

WILLIAM H. SHIPLEY,
Examiner in Chancery.

WASHINGTON, D. C., *Nov.* 17, 1909—
Wednesday, at 3 o'clock p. m.

Met, pursuant to adjournment, at the offices of John Ridout, Esq., Fendall Building, No. 344 D Street, Northwest Washington, District of Columbia, on Wednesday, November 17th, 1909, at 3 o'clock P. M., to continue the taking of testimony on behalf of the defendant.

Present: Henry E. Davis, and Samuel Maddox, Esqs., Coun-
203 sel for the complainant, and John Ridout, Esq., Counsel for the defendant.

Whereupon HENRY MAURICE TALBOTT, the defendant, being first duly sworn according to law, to testify the truth, the whole truth and nothing but the truth relating to the cause at issue, was further examined and testified as follows:

Further direct examination.

By Mr. RIDOUT:

Q. Mr. Talbott, what, if any, agreement, plan, or arrangement, express, or implied, had you either before or after the indictment of Messrs. Pickford, Walter, Shaw, and Bradshaw, with James Hudson who is mentioned in these proceedings, having for its object, or purpose, or tendency, the use of the criminal prosecution of these men, or either of them, in any form, in the interest of the Insurance companies which were losers in the fire mentioned in these proceedings, or any one of the insurance companies? A. I had none whatever.

Cross-examination:

Mr. DAVIS: On behalf of John H. Walter I have no cross examination.

Mr. MADDOX: Nor have I any cross examination.

H. MAURICE TALBOTT.

Subscribed and sworn to before me this 30″ day of November, A. D. 1909.

WILLIAM H. SHIPLEY,
Examiner in Chancery.

NOTE.—Adjourned to meet at the same place on Wednesday, November 24th, 1909, at 3:30 P. M.

204 WASHINGTON, D. C., *November* 30, 1909—
Thursday, at 3.30 o'clock p. m.

Met, pursuant to notice, at the office of John Ridout, Esq., Fendall Building, No. 344 D Street, Northwest, Washington, District of Columbia, on the date above stated, to continue the taking of testimony on behalf of the defendants.

Present on behalf of the complainant Pickford, Mr. Maddox.

Present on behalf of the defendant Henry Maurice Talbott, Mr. Ridout.

Present on behalf of the defendant Lipscomb, and of himself as intervenor, Mr. F. Edward Mitchell.

Present on behalf of himself, as intervenor, Mr. William Ellison.

JAMES HUDSON, a witness of lawful age called by and on behalf of the defendants, having been first duly sworn, to testify and speak the truth, the whole truth, and nothing but the truth in relation to the cause at issue, was examined and testified as follows:

Direct examination.

By Mr. RIDOUT:

Q. Mr. Hudson, you know Mr. Henry Maurice Talbott, who is sitting next to you here? A. I do, yes, sir.

205 Q. Will you please state what, if any agreement, plan or arrangement, direct, or indirect, express or implied you ever had, or now have, with Messrs. Pickford, Walter, Shaw, or with Henry Maurice Talbott, either before or after the indictment, having for its purpose, or either of them, in any form, in the interest, or interests, of the said insurance companies, or any of them, or any one on their behalf, or on behalf of any one of them, who were losers by reason of the fire mentioned in these proceedings?

Mr. MADDOX: Objected to as leading.

Mr. DAVIS: I make the same objection.

A. I don't know of any whatever.

Q. Did you ever have any such arrangement? A. No, sir.

Cross-examination.

By Mr. DAVIS: I have no cross examination.

Mr. MADDOX: I have no cross examination.

JAMES HUDSON.

Subscribed and sworn to before me this 30" day of December, A. D. 1909.

WILLIAM H. SHIPLEY,
Examiner in Chancery.

NOTE.—Mr. Andrew A. Lipscomb, having notified the Examiner that his engagement in the Collier murder case prevented his attendance, the hearing was adjourned subject to notice.

WILLIAM H. SHIPLEY,
Examiner in Chancery.

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206 Met, pursuant to agreement, at the offices of John Ridout, Esq., Fendall Building, corner D and John Marshall Place, on Wednesday, December 8th, 1909, at 3 o'clock P. M., to continue the taking of testimony on behalf of the defendants in the above entitled cause.

Present:

(No appearance on behalf of the complainants.)
John Ridout, Esq., Counsel for the defendant, Henry M. Talbott.
E. S. Mitchell, Esq., on behalf of the defendant, Andrew A. Lipscomb, and as intervenor, and Edwin Forrest, and W. M. Ellison Esqs., as intervenors.

Thereupon ANDREW A. LIPSCOMB, one of the defendants, called on behalf of the defendants, being first duly sworn according to law, to testify and speak the truth, the whole truth and nothing but the truth relating to the cause at issue, was examined and testified as follows:

Direct examination.

By Mr. RIDOUT:

Q. State your name and occupation; also your residence? A. Andrew A. Lipscomb; I am a member of the Bar of the District of Columbia, and I am now residing in Washington, D. C.

Q. Do you know Henry Maurice Talbott, one of the defendants in this case? A. I do.

207 Q. Do you also know Alexander Kilgour? A. Yes.

Q. I wish you would please state what, if any, arrangement, or agreement, direct, or indirect, express or implied, you ever had, or now have, with Mr. Talbott, with respect to the collection of money for the insurance companies, or any one of them, who are concerned in the loss by reason of the fire which is referred to in these proceedings? A. I have never had any such arrangement whatever with Mr. Talbott, nor have I now. The subject was never mentioned by either Mr. Talbott, nor myself, one to the other.

Q. Mr. Lipscomb, what, if any, arrangement, or agreement, express or implied, have you ever had, or have you now, with said insurance companies, or any one of them, or with any person on their behalf, or on behalf of any one of them, for any fee, or for any action to be taken by Mr. Talbott, officially or individually, in the interest of those companies, or any one of them, or for any other purpose? A. I never represented any one of those insurance companies and I don't know them, nor their attorneys, nor their agents. I never had any conversation, or agreement, whatever with Mr. Henry Maurice Talbott concerning them at any time, or at any place.

Q. Mr. Lipscomb, have you read the testimony given in this case by Mr. Alexander Kilgour? A. Yes, I have read it.

Q. Are the statements made by Mr. Alexander Kilgour as
208 to what occurred between you and him on the occasion of the interview to which he refers, correct or not? A. They are not correct as stated there.

Q. State briefly what occurred at this interview? A. Some twelve or thirteen years ago, Mr. James Hudson, whom I had known, called at my office at the corner of 6th and D Streets, Northwest, and he was very much perturbed about some knowledge he had of a crime that had been committed of arson in the burning of a house

at Four Corners in Maryland. He told me that he had knowledge of it, and asked what he should do; he was worried. I told him that if he had a guilty knowledge, either before, or after, the burning of that house, that it was his duty to communicate those facts to the law officer of Montgomery County. At his request I wrote to Mr. Kilgour whom I found was the State's Attorney of that County, and asked him to call at my office at his first opportunity as I had something of importance to communicate to him about a crime that had been committed in the County. He called at my office. I told him the facts that Mr. Hudson had communicated to me, and I said I would not tell him the name of my client unless I had a promise from him that my client would receive immunity as a witness, and Mr. Kilgour promised my client that immunity. The interview terminated, and nothing more was said, and I never saw, nor spoke to Mr. Kilgour about the matter afterwards.

Q. Mr. Lipscomb, what, if any, agreement, plan, or arrangement, direct, or indirect, express or implied, — you ever had, or now have, either before or after the indictment of Messrs. Pickford, Walter, Shaw and Bradshaw with James Hudson to whom you have
209 already referred, or have you now, having for its object, or purpose, or tendency, the use of the original prosecution of these men, or either of them, in any form, in the interest of the insurance companies, or either of them, who were losers in the fire mentioned in these proceedings, or any one of those insurance companies? A. I had none whatever.

Q. On page 54 and 55, of Mr. Kilgour's testimony, he says: That a long time after he was State's Attorney, he met you in Washington on the corner of New York Avenue and 14th Streets, and you asked him not to say anything about what had been said about the interview in your office corner 5th and D Streets. Please state whether you ever met Mr. Kilgour at the locality named, or in any other locality, and made the request of him which he says you made? A. I had none whatever.

NOTE.—As counsel for the complainants were absent at the taking of this testimony, an adjournment was taken subject to notice, counsel for the defendant, Talbott, announcing that he had seen counsel for the plaintiffs and arranged with them that this direct examination might be now taken, reserving to said counsel for the plaintiffs the right to cross examine said witness at a session to be held after notice.

WILLIAM H. SHIPLEY,
Examiner in Chancery.

210 WASHINGTON, D. C., *Jan'y* 8, 1910—
Saturday, at 11 o'clock a. m.

Met, pursuant to arrangement, at the offices of John Ridout, Esq., Fendall Building, No. 344 D Street, Northwest, on Saturday, January 8th, 1910, at 11 o'clock P. M., to continue the taking of testimony on behalf of the defendants.

Present on behalf of the complainant Pickford, Mr. Maddox.

Present on behalf of the complainant Walter, Mr. Davis.

Present on behalf of the defendant Henry Maurice Talbott, Mr Ridout.

Present on behalf of the defendant Lipscomb, and of himself as intervenor, Mr. F. Edward Mitchell.

Present on behalf of himself, as intervenor, Mr. William Ellison.

Mr. DAVIS: I understand that by arrangement with Mr. Maddox, counsel for the complainant Pickford, the examination in chief of Mr. Lipscomb was had on the understanding that the same should be subject to the right of counsel for the complainants, to note any objections to the testimony of the witness, and also to cross examine him. In accordance with this understanding, and in order to give counsel for the defendants, an opportunity further to examine the witness in chief before the cross-examination is taken up, I object to the fourth question beginning with the words "I wish you would please state" as leading and irrelevant.

211 I make the same objection to the following question beginning with the words: "Mr. Lipscomb, what, if any, arrangement."

I object to the 7th question beginning with the words: "Are the statements made by Mr. Alexander Kilgour," as leading, and as too comprehensive in its terms to call for, or justify, the answer thereto in supposed contradiction of the statements of Mr. Kilgour referred to.

I object to the 9th question beginning with the words: "Mr. Lipscomb, what, if any agreement, plan, or arrangement" as leading; and I object to the answers to each of these questions so objected to, and, further, to the answer to the 10th question beginning with the words on pages 54 and 55 of Mr. Alexander Kilgour's testimony, as not responsive to the last mentioned question, and I object to the answers of each and every of the questions thus objected to, and give notice that on the hearing I will move that they be stricken out and not considered by the Court.

Mr. MADDOX: As counsel for the complainant, Pickford, I join in those objections and the motion.

Mr. DAVIS: I wish to ask Mr. Ridout and Mr. Mitchell, do you, or does either of you, in the light of these objections, and this notice just given, desire further to examine Mr. Lipscomb, the witness, before he is cross examined?

Mr. RIDOUT: Counsel for the defendant, Henry Maurice Talbott, has no desire to further examine the witness on direct.

Mr. MITCHELL: Counsel for Mr. Lipscomb is content with the direct examination of the witness.

212 Thereupon ANDREW A. LIPSCOMB, a witness of competent age, having been first duly sworn according to law, to testify and speak the truth, the whole truth and nothing but the truth relating to the cause at issue, was recalled, and testified as follows:

Cross-examination:

Mr. DAVIS: Without waiving the objections, or any of them just stated, or the notice just given, I cross examine the witness.

By Mr. DAVIS:

Q. Mr. Lipscomb, how long have you been a member of the Bar? A. I cannot remember the exact time; as long as you have, Mr. Davis.

Q. Well, that is a little over thirty years? A. Well, I have been that long a member of the bar I suppose.

Q. And, during that time, you were for some years, assistant United States Attorney in this District, were you not? A. Oh, yes.

Q. For four years? A. I don't remember how long.

Q. How long have you known James Hudson? A. I declare I cannot say. I have known him a great many years.

Q. Prior to the interview with Mr. Alexander Kilgour, about which you were asked on your examination in chief, and to which both you and Mr. Kilgour have testified, how long had you
213 known him? A. I think I can approximate that—I fancy I have known Mr. Hudson, because he lived in Mount Pleasant near where I did—he was then living there I know, and it was then a small village—I fancy I knew — from in 1875, or 1876—he was then a painter and was in business on Pennsylvania Avenue.

Q. And, prior to that interview, was Hudson at any time your client? A. I think he was in some minor matters—yes, I am sure he was in some domestic matters he had, and some other minor matters. They did not reach any suits. Yes, he was a client of mine.

Q. You stated, that interview to which I have referred, was had in your office at the corner of 5th and D Streets, Northwest? A. Yes, sir.

Q. In what building was that? A. I cannot designate it any better than that does.

Q. Well, was it the building at the northwest corner of 5th and D Streets? A. Yes, it was formerly Police headquarters.

Q. At the northwest corner of 5th and D streets? A. Yes, sir.

Q. You state that on this occasion, Hudson called at your office, and was very much perturbed about some knowledge he had of the crime of arson in the burning of the house at Four Corners in Maryland; that he told you he had knowledge of it, and asked you what he should do; that he was worried. In that interview did what passed between you and him so pass in the relation
214 of attorney and client? A. I think so; but if he will release me from any obligation I will testify to what transpired. I may add that I fancy that he came here in that capacity although I knew him for a long time.

Q. In that interview, if you can answer the question without violating the relations of attorney and client, state whether he claimed to have had anything to do with the burning of that building?

Mr. MITCHELL: I object to the question on the ground that it is irrelevant and immaterial apart from any question of privilege, as to which question of privilege a witness is competent to exercise his discretion, and is also competent to testify.

Mr. DAVIS: Is counsel's objection insisted upon.

Mr. MITCHELL: I insist upon the objection.

Mr. DAVIS: The question is withdrawn.

Mr. RIDOUT: I have no objection if the witness wishes to answer the question.

Mr. DAVIS: In the light of the remark made by Mr. Ridout, counsel for Mr. Talbott, I repeat the question and ask for an answer.

Q. In that interview, if you can answer the question without violating the relations of attorney and client, state whether he claimed to have anything to do with the burning of that building?

Mr. MITCHELL: I make the same objection.

A. I am placed in the embarrassing situation as to that question. If Mr. Hudson consents that I should tell, I have no objection to answering the question. Mr. Hudson has been examined as
215 a witness himself, although I have not read his testimony, and he should have been asked the question by counsel. The question says: "Did Hudson have anything to do with the burning of the building." Did he tell me, or have anything to do with the burning of the building.

Q. What is your answer to that question? A. I cannot answer that he told me that he did not, but he had knowledge of who burned the building.

Q. As a result of that call by Hudson on that occasion, you communicated with Mr. Alexander Kilgour, then State's Attorney, for Montgomery County? A. I did.

Q. Do you remember whether by letter or telegram? A. I am quite positive that it was by letter as I did not see that it was vital enough to send a telegram and waste money in that way, and I communicated with him undoubtedly by letter.

Q. And the interview that took place between you and Mr. Kilgour was the result of that communication? A. Undoubtedly so.

Q. You say that in that interview you reported to Mr. Kilgour the facts that had been communicated to you by Hudson, but that you declined to reveal Hudson's name unless Mr. Kilgour would promise him immunity as a witness—is that correct? A. Well, this was thirteen years ago. In this I will be positive if you will allow me to answer fully—I had no object in the world in that matter except to relieve Hudson's mind, and I was not going to give Mr. Kilgour any secrets unless immunity for him was prom-
216 ised: I am positive that immunity was promised to Hudson. I think it was in writing and I gave it to Mr. Hudson.

Q. In your deposition you state that Mr. Kilgour was told by you that Hudson was an accomplice in the burning of that house—is that so? A. I don't think so; I don't think I would call him an accomplice; I must have said he thought he had the knowledge of it before, and I know I told him that he should communicate the facts whether before or after, and I may have said it in that sense: that he was an accomplice before. I did not say, but I admit Mr. Hudson stating it to be an accomplice after the fact.

Q. In that interview, was the question of the possibility, or prob-

ability, of procuring a conviction upon the testimony of an accomplice discussed between you and Mr. Kilgour? A. I do not think it was in the slightest degree; it may have been—it may have been. I would rather strike out that; I would rather say it was not in the slightest degree; it might have been.

Q. In that interview, did you communicate to Mr. Kilgour the names of any persons as having knowledge of the circumstances of the burning of the house? A. I do not think I did. I don't think I knew them.

Q. And the promise that you wanted from Mr. Kilgour was the immunity for Hudson as a witness, or as an accomplice after the fact? A. Why there was no immunity needed as a witness; of course it was immunity from guilty knowledge either before or after.

217 Q. Mr. Lipscomb, I put the question in the way I did because you are reported to have said that you wanted to receive immunity for him as a witness? A. Well, I don't care which way you put it; it is the same one way as the other. I was claiming immunity for Hudson, and that was all I was looking out for.

Q. Mr. Kilgour has testified that you asked him if he would put in writing what he said about extending immunity to Hudson, and that he declined to do so—what is your recollection about that? A. My recollection, Mr. Davis, is that it was in writing, and I handed the writing to Mr. Hudson. About that I will not be positive; I did not know Mr. Kilgour until that time, and I would much prefer to have any proposition of that sort in writing from him.

Q. And, according to your testimony in chief, the sum total of the interview between you and Mr. Kilgour was, that you told him the facts that Hudson had communicated to you, and told him that you would not reveal Hudson's name unless you had a promise of immunity from him; that Mr. Kilgour promised that immunity, and the interview then terminated? A. I don't say that was the sum total. I did not testify, as I recollect, that it was the sum total of the conversation as you stated it—the substance of it.

Q. I read from your deposition as follows:

"At his request" (meaning Hudson's request) "I wrote to Mr. Kilgour, whom I found was the State's Attorney of that County, and asked him to call at my office at his first opportunity, as I had

218 something of importance to communicate to him about a crime that had been committed in the County. He called at my office. I told him the facts that Mr. Hudson had communicated to me, and I said I would not tell him the name of my client unless I had a promise that my client would receive immunity as a witness, and that Kilgour promised my client that immunity, and the interview terminated and nothing more was said, and I never saw, or spoke, to Mr. Kilgour afterwards." Is the statement that the interview terminated, and nothing more was said correct? A. Yes, I think so.

Q. And, in the quotation that I have made from your testimony in chief, are you correctly reported? A. I suppose I am.

Q. Then, it does appear, Mr. Lipscomb, that the sum total of the

interview between you and Mr. Kilgour was as I assumed in the former question, namely, that you told him, Kilgour, what Hudson had communicated to you; said that you would not tell him, Kilgour, the name of your client unless you received immunity for him, and the interview terminated? A. In answering the question I refuse to use the word "sum total." I never used it in my direct testimony and I will not use it now.

Q. Mr. Lipscomb, your deposition as reported will speak for itself? A. Undoubtedly.

Q. Besides what you have stated in that interview, did anything else pass between you and Mr. Kilgour? A. I cannot recollect; I think nothing else.

Q. In that interview, did Mr. Kilgour tell you that if you had witnesses to show that any offense had been committed, you
219 should send them up to Rockville, and he would see that they were presented to the grand jury, and that the whole matter should be considered? A. I have not the slightest recollection of any such conversation.

Q. Well, as a matter of fact, you never did communicate further with Mr. Kilgour on the subject? A. I had not the slightest object to communicate with him when I had immunity from him for my client; of course I did not.

Q. Then, the object of your interview with Mr. Kilgour was merely to acquaint him of the fact that your client, Hudson, had knowledge bearing upon this alleged crime, and that you desired immunity for Hudson before he appeared, or should appear, as a witness? A. If you mean by the use of the word "alleged crime" I did not consider it an alleged crime; I thought it a real crime.

Q. Well, without being critical about the word "alleged" which I use because it has been, so far as there has been any adjudication on the subject at all,—it has been adjudged that there was no crime—I will ask you whether your object in seeing Mr. Kilgour was confined to procuring immunity for your client, Hudson, in case he, Hudson, should appear as a witness in relation to the burning of the house in question? A. My object was just what I stated on the direct examination. My client came to me in a very much perturbed state of mind. It has been so long ago that it made no particular impression on my mind, but my sole object was to relieve the
220 burden of his mind, and to place him in the right light before the prosecuting attorney in that County as I understood, and that was my object and my only object.

Q. At the time, Mr. Kilgour had no hint that Hudson knew anything about the crime? A. I don't think Mr. Kilgour had any hint, except from public rumor that there had been a crime committed.

Q. My point is, Mr. Lipscomb, so far as you then knew, Mr. Kilgour had no hint of any relation of any sort of Hudson to the burning of that house, or had no knowledge in relation thereto? A. I don't know what Kilgour knew about it.

Q. My question is, Mr. Lipscomb—so far as you knew Kilgour knew nothing? A. I don't know how far Kilgour knew about it.

Q. But you knew how far you knew? A. I read the papers about it. I don't know whether Kilgour knew or not.

Q. It occurs to me as rather unusual for an attorney to inform a prosecuting attorney, without any knowledge on his part in the premises, that such attorney's client had relations to the offense, and to ask immunity for that client in advance of any intimation that he was in any danger of becoming involved in the premises—now, in the light of what I have just said, I repeat the question—whether at the time you had this interview with Mr. Kilgour, he, Kilgour, to your knowledge, or surmise, or suspicion, had any hint, or intimation of any relation whatever of Hudson to this burning, or any knowledge of its circumstance? A. Answering the first part
221 of your statement I say what seems unusual to you will not seem unusual to other people. Answering the second part of your question, if question it be, I would say that I do not know what Hudson knew; I did not know what Kilgour knew. I only knew that I had one single duty to perform. I said this man was in a state of worriment about his duty; I regarded it his duty to tell the prosecution.

—. Mr. Lipscomb, you seem to have qualified the apprehension of your duty by exacting the condition that the man who was to give the information, should be promised immunity for giving it? A. Certainly so—what did I want but that.

Q. Then, it narrows itself down to this, that you sent for Mr. Kilgour and told him that you knew of a man, your client, who had knowledge of a supposed crime in his jurisdiction; that you would let him know who that man was, and put Mr. Kilgour upon information to prosecute the crime, if your client should be given that immunity? A. That is not what I said. It is an argument on your part.

Q. You felt it your duty to let the State's Attorney know that there existed to your knowledge, information that would tend to show the commission of a crime. You sent for the State's Attorney, and told him what you would let him know, or what you knew, upon the condition that he would give your client the immunity that was the object of the interview? A. I didn't tell him that I had any knowledge. I told him that I had a client who had knowledge of the burning there, and that it was a crime.

222 Q. You had the knowledge that this man, or your client, had conveyed to you? A. Undoubtedly.

Q. And that you thought it was your duty to get to the State's Attorney? A. I certainly thought it was my duty to do that; it possibly entered into my mind that a crime of that sort ought to have been punished. I do not know that it did, but I certainly thought it was my duty to relieve my client of worry about it.

Q. But my question is—that you did not think it was your duty to bring the State's Attorney in condition with your mind except upon the condition that your client should be first promised immunity? A. I certainly did not, and I would have been derelict in my duty as a lawyer if I had not done so.

Q. So that, as you apprehended your duty at that time, you felt

that you should let the State's Attorney know that there was a man with knowledge of this alleged offense, but only upon condition of immunity for that man? A. I think I have answered that question.

Q. Do you remember how long after this interview, Mr. Kilgour continued to be State's Attorney? A. I have not the slightest idea.

Q. Perhaps, Mr. Lipscomb, I am under a misapprehension about a portion of your testimony given in your direct examination. You are reported as having stated that you communicated to Mr. Kilgour the facts that Mr. Hudson communicated to you. To be sure
223 about that I will read again from your testimony in chief: "I told him the facts that Mr. Hudson had communicated to me," and, if I remember correctly, you have just said a few minutes ago, that you did not know what Hudson did know? A. I knew what Hudson told me; I, of course, communicated it to Mr. Kilgour. I think I gave him a statement. It made no impression on my mind. I did all that I thought it was right to do.

Q. Of course, owing to your knowledge of the law, you did not expect Mr. Kilgour to attempt to prosecute an indictment and conviction on the unaided testimony of a man who might be an accomplice either before or after the fact? A. I certainly understood that as a principle of law. I certainly understood also that there were plenty of people who knew that that house was burned when it was unoccupied and material taken out of the house. I supposed there would be corroborative witnesses, although I never saw them.

Q. Had Hudson given you the circumstances as to the burning of the house? A. He told me the details. The toll gate keeper told me that Pickford and Bradshaw went out there at the time of the burning.

Q. Did you communicate to Mr. Kilgour the name of the toll gate keeper? A. I did not have the slightest object in doing so; all I wanted was to get immunity in the prosecution of the crime for my client.

Q. You asked immunity for your client, and it was promised, and there the matter stopped? A. Exactly true, and I did noth-
224 ing more about it, and it dropped from my mind.

Q. You stated that you do not know when Mr. Kilgour's term expired, nor when Mr. Talbott's term as State's Attorney began? A. I do not know when Mr. Kilgour's term expired, and I do not know when Mr. Talbott's term began. I did not know Mr. Talbott until I went to the Police Court when I appeared as Hudson's attorney. I did not know Mr. Talbott before that time.

Q. So that, at no time, during Mr. Talbott's incumbency of the office of State's Attorney, did not communicate with him about this burning? A. No, not in the slightest; I never knew him.

Q. Never told him anything about Hudson? A. Not a thing in the world; I never saw him and never knew him; either in that matter, or in any other; I was not acquainted with him at all.

Q. You refer to having been counsel for Hudson in the Police Court—that was in the case in which Hudson and Houp were charged with conspiracy? A. Against Pickford, yes, sir.

Q. Were you counsel for Houp too? A. No, sir; Judge Mackey,

I think, was counsel for Houp; I did not know Houp up until that time.

Q. Did you at any time, either while Mr. Talbott was State's Attorney, or Mr. Kilgour was States Attorney, advise Hudson to go to Rockville, Maryland, in this matter? A. Never in the world; he never went to Rockville, I believe, as a witness.

225 Q. When did you first become aware of that fact? A. Of the indictment?

Q. Of the fact that Hudson had gone to Rockville? A. I did not have the slightest idea. I did not even know of the indictment until the papers announced it.

Q. And it was not before the indictment that you heard that Hudson had been to Rockville? A. Absolutely so.

Q. You brought the suit for Hudson against Pickford for false arrest, did not you? A. Mr. Ellison and I brought the suit. I do not know whether Mr. Mitchell was in it or not.

Q. Did you also bring one for Hoff? A. I think I did; I do not remember; I think Houp's case was dropped in some sort of fashion; I think I brought Houf's too.

Q. You were also counsel for Mr. Talbott in the libel suit against Pickford and Mr. Walter? A. I filed the declaration, but Mr. Ellison and Mr. Mitchell were my associate counsel in the case.

Q. And you appeared in the trial? A. Oh, yes.

Q. Without seeking to pry into your personal affairs, Mr. Lipscomb, in how many cases have you appeared as counsel for Hudson since the interview you had with Mr. Kilgour? A. How many?

Q. Yes. A. Well, I certainly appeared at the Police Court, and I certainly brought the suit to which you have just referred for

226 damages; in no other case that I now remember did I appear for him.

Q. Do you remember a suit brought by Mr. Pickford against Haup on a promissory note that was tried before Justice Bundy, at which Hudson was a witness? A. I do remember, since you refresh my memory; that suit was tried right here in the basement of this building. The case was brought by somebody against Haup and Hudson, and I represented Hudson, I think, in that case.

I don't remember distinctly now about it; it was a J. P. case on a promissory note.

Q. Don't you, in fact, remember that the suit was against Haup, and that Hudson was a witness, and you were present as counsel for Hudson, and advised him as to his privilege? A. You are right about that. I was not going to let him say anything that would injure him. That is quite correct. I state that it was after his arrest and I was looking out for his rights.

Q. Do you remember, Mr. Lipscomb, the occasion, without giving the exact date of the issue of the restraining order in this case—the order restraining the collection of the judgment obtained by Mr. Talbott against Pickford and Walter? A. I don't remember, no sir.

Q. You remember as a fact, do you not, that there was a restraining order issued in this case—you know that to be a fact? A. I think there was, yes, sir.

Q. Can you state how soon after that order was issued you became aware of its issuance? A. I cannot.

227 Q. Did you have an interview with Mr. Pickford after the restraining order was issued—an interview at the Toronto Apartment House where he lived at that time? A. I had several interviews with him either at my office or elsewhere.

Q. Now, coming to the first one of these interviews—where was it, if you remember now? A. I think the first one was at my office. I am not certain about that.

Q. Did you have more than one interview with him at the Toronto? A. Several

Q. At the first one of these interviews did you state to Mr. Pickford that you thought you could expose this whole matter, and that you ought to do it? A. I certainly did not—I had no matter to expose.

Q. And, did you say to him in that interview that you at that time knew, using the expression I now use: "That this job was put upon you by Talbott, or Talbott and Hudson, and that you should not pay one dollar, and if there is anything I can do to help you I will be willing to do it"? A. Of course I never said any such thing.

Q. Do you know Mr. Charles R. Newman? A. Very well; he was present at the first interview—not one word of such a conversation took place; I am positive that no such conversation as that took place.

Q. On the occasion of this interview, you dined with Mr. Pickford at the Toronto, did you not? A. I don't remember whether I did or not; I think I did.

228 Q. And Mr. Charles R. Newman was in the party? A. Yes. Fix the date, show me the check that Mr. Pickford gave me.

Q. When you and Mr. Pickford were in conversation on the occasion that I am now inquiring of, did Mr. Pickford ask you if you had any objection to saying before Mr. Charles R. Newman what you had said to him? A. No.

Q. Do you recall, Mr. Lipscomb, Mr. Pickford asking you if you had any objection to saying before Mr. Newman what you had said to him, Pickford, and you replied: "No; that there was no language at your command strong enough to denounce Talbott about what he was," or the substance of that? A. Of course I did not say that, but if you say, "Did I denounce Talbott," I would say that I did; Talbott had quarrelled about our fees, and I do not hesitate to denounce him now. To say that I said Talbott put up a job is not so. I did not say anything else except to denounce Talbott for quarelling about the fees he was to give us.

Q. Did you say: "He is as bad as the man who bartered his mother's virtue and robbed her of her share of the spoils." A. I never used any such rhetoric as that.

Q. Did you say anything like that? A. Nothing like it on this earth.

Q. Did you agree with Mr. Pickford that you would undertake to

expose this matter in a professional way, and without the expectation of compensation? A. No, sir.

Q. Did Mr. Pickford ask you on this occasion, how much
229 you would like on account, and did you mention $75.00? A. No.

Q. Did he, on that occasion, give you a check for $75.? A. I think not. No he did not.

Q. Perhaps the amount was $50. Did you ask for $50? A. I did not ask for $50. If you show me the check I will tell you.

Q. I show you this paper, and ask you to state if you have seen that before? A. (After looking at paper.) Yes, that is my signature on that; I received that from Mr. Pickford. *Where* I received it on this occasion, or not, I do not know. I received it, cashed it, used it or spent it.

Q. This check reads as follows:

Mr. RIDOUT: I object to this offer so far as it is an attempt, or may be construed, as an attempt to bind, Talbott by any statements made, or action taken, by Mr. Lipscomb, out of Mr. Talbott's presence.

Mr. DAVIS: Will you agree that I may read the check into the record without filing the check? A. Oh, yes; I will agree to that.

"WASHINGTON, D. C., *Mc'h* 7, 1909.

Pay to the order of Andrew Lipscomb $50.00, Fifty Dollars.
(Signed) T. H. PICKFORD.

To United States Trust Company, Washington, D. C.

Endorsed: Andrew Lipscomb. Maurice Stein."

Q. I understand that you received that check and canceled it? A. Undoubtedly, and used it.

230 Q. There is also on the check the stamp of the Commercial National Bank, of March 9th, 1909? A. Yes.

Q. On receiving this check, did you promise Mr. Pickford that you would go and see Hudson? A. No.

Q. Did you promise that you would go and see Hudson, and have him expose the whole thing? A. No.

Q. Did you subsequently see Mr. Pickford at the Toronto Apartment house? A. I don't remember. I met him two or three times when I was in there. I had several interviews with him; we were trying to settle the judgment.

Q. Well, was there a second occasion on which you received a check? A. Yes, I received one at my office I think. I think it was at my office.

Q. Look at this paper, please, and state whether that is the check you received? A. Yes, that is my name. That is all right. I received it and got the money and spent it.

Q. This check is as follows:

"WASHINGTON, D. C., —— —, 1909.

Pay to the order of Andrew Lipscomb $70.00 Seventy Dollars.
(Signed) T. H. PICKFORD.

To United States Trust Company, Washington, D. C.

Endorsed: "Pay to the order Bloom Sons Company. Andrew Lipscomb."

231 It bears the stamp on the back of the American National Bank of New Orleans, Louisiana, of March 17th, 1909. Also the stamp of the 1st National Bank of Baltimore, Maryland, of March 20th, 1909, and the stamp of the National Bank of Washington, D. C. of March 22nd, 1909. It also bears in writing the endorsement, dated March 15th, of Bloom Son Co.

Does the endorsement by you over to Bloom Son Company help you to fix the place where you received this check at your office, or at the Toronto Apartment house? or wherever you received it? A. I received it.

Q. Wherever you received it on the occasion when you received it, did you repeat your promise to see him, Hudson, and have him expose the whole matter, you to receive $500, in addition? A. Of course not.

Q. Did you, on either one of these two occasions, say to Mr. Pickford that you did not want anybody to know what you were doing? A. No, I did not.

Q. And did he promise you that nobody would ever hear from him about it if you would go on and expose the mater? A. I perfectly understood when I received his checks that you would have them the next morning.

Q. That does not answer my question? A. Of course I did not do that.

Q. Did you, on the occasion of your first interview, ask Pickford if he believed that you were a party to this scheme? A. As
232 there was no scheme that I knew of, of course I did not ask him such a thing, and he did not tell me anything of that kind whatever.

Q. Well, without regard to the argument involved in your answer, did you ask Mr. Pickford, if he, Pickford, believed that you were a party to the scheme? A. I do not know what scheme you mean—I never stated that.

Q. And, did Mr. Pickford reply that he did, but that in view of what you told him in your conversations with him, he had changed his mind? A. No such conversation took place that I know of.

Q. So that, Mr. Lipscomb, without going into unnecessary details, the fact is that you did not at this interview of which I have inquired, or either of them, say to Mr. Pickford, that for proper compensation you would undertake to expose the fact of the job (charging him, Pickford, with complicity in burning that house) which was put up on him by Hudson and Talbott? A. Oh, no; I never said it.

Q. Nor anything to that purport? A. Nothing that you could draw the slightest inference of any such fact.

Q. And, as I understand, Mr. Newman was present at one of these interviews? A. Yes; when the $50. check was given, Mr. Newman, I think, was present. When the other check was given he was not present. Mr. Newman was absent from two or three interviews that we had altogether.

233 —. Mr. Lipscomb, you have volunteered the statement that you knew that when these checks were respectively given to you by Mr. Pickford, I would know of it the next day? A. I knew that.

Q. What made you say that? A. I knew he was trying to trap me.

Q. If you knew he was trying to trap you, why did you take the chance? A. To catch him.

Q. But you used the money? A. Certainly.

Q. Was your using the money any part of your caution? A. Oh, No.

Q. As your answer stands, you knew that Pickford was trying to trap you by giving you those two checks? A. Do you want me to give the circumstances under which I thought you would see those checks. I knew that immediately after I cashed those checks, they would be in the hands of his attorney.

Q. You expected Mr. Pickford to pass what was occurring in these conversations between you and himself? A. I fancied he might give the checks to his attorney. We were both on friendly terms then; he was trying to make arrangements to settle the judgment; at least he said he was, and I knew I would like to.

By Mr. MADDOX: I have no further cross examination.

Redirect examination.

By Mr. RIDOUT:

234 Q. Mr. Lipscomb, at the time of these interviews with Mr. Pickford, or any one of them, had you or not any knowledge, information, or suspicion, which would have justified the making by you the statements which have been sought to be attributed to you?

Mr. DAVIS: Objected to as leading and not re-direct examination, and as calling for an argument, and not a statement of fact.

A. I never made the statements, and therefore I had no reason and no knowledge to justify it.

By Mr. MITCHELL:

Q. Mr. Lipscomb, you state that the checks which have been offered in evidence here, at the time of the receipt of those checks, Mr. Pickford was negotiating with you for a settlement of the case of Talbott against Pickford. I would like you to answer that question more fully? A. Yes.

Q. You may state what happened? In your own way, state what happened in these different interviews? A. Mr. Talbott and I had

a quarrel about fees, and I was very angry with him. Pickford had offered through Mr. R. Golden Donaldson to settle the judgment and give me a check for $8,500 in order that I might get my fee. I had no right to make that settlement. I had been Mr. Talbott's attorney in this cause, and he had been to Mr. Pickford to settle the case behind my back, and was endeavoring to do so, and Mr. Pickford came to me and wanted to make arrangements to settle, and it was before this bill was filed. I have no bad feelings
235 against Mr. Pickford in the world, and we had none toward each other. He wanted to see if he could not save something on the judgment, and I wanted to get my fee, so I had interviews with Mr. Pickford, and I particularly suggested that Mr. Newman should be present, Mr. Newman being the intermediary, and I wanted to save Mr. Mitchell's fee and Mr. Ellison's fee in the matter. At one time Mr. Pickford promised to put our fees in escrow in the trust company. At the first conversation Mr. Pickford showed me a letter from Mr. Poe, in which Mr. Poe had written an opinion for him, for which he received $50, which he showed me, in which letter Mr. Poe stated that Mr. Pickford had a right to appeal the present case to the Supreme Court of the United States.

He asked me what my opinion was about it, and I told him I thought Mr. Poe was correct, and that seemed to satisfy him, and we went into the discussion of what he would take in settlement of the cause.

Q. Not in settlement of the present case? A. He asked whether he had a right to appeal to the Supreme Court of the United States in this cause.

He paid me $50 that evening by a check in the presence of Mr. Newman. I don't know how he considered he paid it, or whether he considered it a fee for my opinion, and he spoke about employing me in the manslaughter case and he paid me $70. I was angry with Talbott and I was friendly with Pickford. I have nothing against Mr. Pickford at this time. All these things were talked about in the general conversation. He asked me if Hudson would settle, and it was during these numerous interviews. He told me that he sent Walters to see Hudson, and Hudson told him he
236 would refuse $500, and he asked me on what basis Hudson would settle. I saw Mr. Hudson as a result of these interviews, and Mr. Hudson would not settle for any such sum. Hudson would not settle, and that was all there was to it, and under those circumstances the money was received, and I used it, and after this bill was filed with all this defamatory matter in it, all negotiations were at an end. I really thought that the $70 was paid to me as a fee by Mr. Pickford. I am not sure that Newman was present at the first interview. I will add this, that Mr. Pickford always expressed the greatest desire to protect by fees in this matter.

Recross-examination.

By Mr. DAVIS:

Q. Mr. Lipscomb, is not it a fact that in June 1907, nearly two years prior to the dates of these checks, you had assigned of record

all of your interest in the judgment in the case of Talbott against Pickford and Walter? A. I had assigned it; certainly so.

Q. Were they parties to this suit? A. Yes.

Q. And you had no further interest in that judgment? A. Oh, yes; I had the interest in there to see that the debt was paid out of the judgment.

Q. You had no personal interest? A. I wanted to see the persons to whom I assigned the judgment, get the money; I was not throwing them down.

Q. And, of course, under that assignment, your assignee was to receive whatever might come out of the judgment on your
237 account? A. Yes.

Q. Now, as I understand, Mr. Lipscomb, Pickford was consulting you about whether he could have an appeal to the Supreme Court of the United States in this present case? A. I would not say that; the conversation covered his defence in the manslaughter case; what he considers he paid it for I do not know; he gave the check to me; I did not ask him what he paid it to me for.

Q. But, Mr. Lipscomb, you have volunteered this statement—Mr. Pickford was consulting you about his right to appeal in this case, and he gave you this check for $50 for your opinion? A. Yes, sir; I fancy that he might consider that $50 he gave me in that light. The other check of $70 I suppose he gave me on account of a fee of $500 to assist him in the manslaughter case.

Q. Did you suppose that Mr. Pickford was going behind the back of his attorney and ask your opinion as to the appeal in the Pickford case? A. He went to Mr. Poe, and he went to Mr. Darlington behind the backs of his attorneys, so he told me.

Q. My question is—at the time you received this check for $50, you say you knew the matter would reach Mr. Maddox or myself? A. I supposed that anything I did would come to you or Mr. Maddox, and I did not care.

Q. If you believed at that time, Mr. Lipscomb, that Mr. Pickford was going to inform Mr. Maddox and me of the passage of this check for $50, and that he was attempting to trap you, why
238 did you take it? A. I will modify that expression; I meant by that that Mr. Pickford would give it to Mr. Maddox. I did not mean you, because you were not his attorney, but I knew that you would know about it soon after I received that check, and Mr. Pickford claimed he was trying to help me get my fee, and I was trying to help Mr. Pickford. I knew Talbott was trying to settle the judgment behind my back.

Q. When Mr. Pickford consulted you about the right of appeal in this Talbott vs. Pickford and Walter case, did you say anything to him about the impropriety of it? A. Certainly I did not; he showed me Poe's letter or opinion, and I told him that I certainly thought he had a right to appeal the case to the Supreme Court of the United States, and that is all the conversation there was.

Q. Then, it narrows itself down to this, according to your under-

standing—Mr. Pickford consulted you as a lawyer, you representing the plaintiff, as to taking an appeal in the case in case he lost it; that he was consulting you in your individual capacity; that you advised him in your professional capacity, and received compensation from him for your advice? A. No, that is not so; if he wished to pay me I did not see any reason why he could not do it. He employed me in the manslaughter case, and it was indefinite to me what that $50 was received for.

ANDREW A. LIPSCOMB.

Subscribed and sworn to before me this 31st day of January, 1910.

WILLIAM H. SHIPLEY,
Examiner in Chancery.

Mr. RIDOUT: We close our case on behalf of the defendant, Talbott.

239 *Testimony in Rebuttal.*

Filed February 26, 1910.

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WASHINGTON, D. C., *February* 8, 1910—3 o'clock p. m.

Met pursuant to notice at the office of Maddox & Gatley, Washington, D. C.

Present on behalf of the Complainant Pickford, Mr. Maddox.

Present on behalf of the Complainant Walter, Mr. Davis.

Present on behalf of the Defendant Henry Maurice Talbott, Mr. Ridout.

Present on behalf of the Defendant, Lipscomb, and of himself as intervenor, Mr. F. Edward Mitchell.

Mr. MITCHELL: I would like to make a statement on the record before the taking of testimony begins. In view of the testimony of Andrew Lipscomb at the last session I feel it impossible to longer serve as his counsel, and give notice that I will ask permission of the Court formally to withdraw at the hearing. I make this statement, however, still having the fullest confidence in the integrity of the judgment rendered in favor of Henry Maurice Talbott, and in so far as my interests in that judgment are concerned as an intervenor will appear in propria persona to maintain same.

240 Whereupon THOMAS H. PICKFORD, one of the complainants herein, being called in rebuttal, and having been first duly sworn, testified as follows:

By Mr. MADDOX:

Q. Are you the Thomas H. Pickford against whom judgment was recovered in the Supreme Court of the District of Columbia by Henry Maurice Talbott in a libel suit for $8500, away back in 1906? A. Yes, sir.

Q. And you took an appeal in that case to the Supreme Court of the United States? A. Yes, sir.

Q. When did you first hear of the action of the Supreme Court in that case?

Mr. RIDOUT: Objected to as not rebuttal.

A. About the first of December.

By Mr. MADDOX:

Q. On the day the judgment was rendered? A. On the day the judgment was rendered.

Q. From whom? A. Andrew Lipscomb.

Q. How? A. By telephone and afterwards personally, during the same day.

Q. Did he come to see you in regard to it? A. He came to see me at the Toronto Apartment House the same evening after telephoning me he would come up.

241 Q. The same day that the judgment was affirmed? A. Yes, sir.

Q. What did he say?

Mr. RIDOUT: Objected to on the ground that if this witness is called in rebuttal to contradict Mr. Lipscomb he must be interrogated in the words that were put to Mr. Lipscomb, the foundation being thus limited.

A. Andrew Lipscomb came to see me on the day this judgment was affirmed after telephoning he would come up at once to see me at the Toronto Apartment House. He claimed his share of the judgment was $2500 and offered me a discount of 25 per cent if I would pay it direct to him. He stated that if the money was paid to Maurice Talbott and he got hold of it, he would beat him out of his attorney fee. That was his reason for offering this discount to have it paid direct to him.

Mr. RIDOUT: Counsel moves to strike out the answer of the witness as not rebuttal and not contradiction within the limits of the law of evidence.

Mr. MADDOX: I understand your objection is to all of this, and you need not repeat it.

Mr. RIDOUT: It is understood counsel for defendant Talbott objects to any testimony beyond the limits which are well defined on the subject of contradiction of witnesses.

By Mr. MADDOX:

Q. Go ahead. A. He told me that I ought to protect the attorneys in the case; that he and I knew this job was put up on me by Maurice Talbott and James Hudson; that he did not know

242 it at the time or he would not have acted as attorney, but he had since learned the facts in the case and he thought it was my duty to protect him as far as I could and not let the money go to Talbott.

Q. What did you say with regard to this proposition about fees?

Mr. RIDOUT: The same objection.

A. I told him I wanted to settle the judgment just as cheaply as I possibly could; that I had no ill-will toward the attorneys in the case, but I would like to save every dollar I could on account of the judgment, and that I would see him later about it.

Q. Did you see Talbott about this time?

Mr. RIDOUT: I object to any questions seeking to elicit conversations between Talbott and the witness, as not rebuttal.

By Mr. MADDOX:

Q. Go ahead. A. Talbott came to see me at the Toronto Apartment House on the following day. He came several times. The first time he notified me not to pay any money to Andrew Lipscomb; that if he got the money he would do away with it and not turn it over to him, and that he was no longer his attorney. He said that to avoid Lipscomb having anything to do with it he had assigned his share to a son so Lipscomb could not get hold of it. He
243 asked me if I would not settle with him direct, stating that Lipscomb and Hudson were the parties that put up this job on me, and he had only heard of it and learned the truth of it recently.

Q. Did you see either Lipscomb or Talbott subsequent to that time? A. They came several times to see me; both of them.

Q. What action, if any, did you take later in the month of December with regard to this matter?

Mr. RIDOUT: Same objection.

A. I got up a temporary injunction.

Q. No, I do not mean that. In December, before the injunction? A. I got Mr. Newman to go and see Lipscomb, to see if he could get Lipscomb to expose the whole case, and he went at different times to see Lipscomb.

Q. Then you say you filed the bill for the restraining order, which was filed in January, 1909? A. Yes, sir.

Q. And this restraining order was issued early in January, 1909? A. Yes, sir.

Q. Did you see Mr. Lipscomb after that, and if so, when? A. I did not see him until the following March.

Q. Under what circumstances did you see him then?

Mr. RIDOUT: Same objection.

A. I met Mr. Newman down town at his office on F street, and he told me——

244 Mr. RIDOUT: I object to what Mr. Newman may have told him.

By Mr. MADDOX:

Q. Go ahead. A. He told me he had seen Mr. Lipscomb and that he and Lipscomb were coming up to see me at the Toronto that day with reference to this Talbott case and the exposure of the whole thing.

Q. Did they come? A. They came up there about five or half after five that same evening.

Q. What occurred?

Mr. RIDOUT: I object to the question as not being a proper question to elicit contradiction of the witness Lipscomb.

By Mr. MADDOX:

Q. What occurred? A. Shortly after Lipscomb and Mr. Newman came, I suppose for about ten or fifteen minutes, we talked about various things. Then the dinner bell rang in the café and I invited Lipscomb and Newman to dinner, and we all went in and had dinner. We talked over this case, all about the matter, and Mr. Lipscomb told me several times during the conversation that he knew Talbott was a party to this thing; that he was willing to do anything he could to right the wrong that had been done me, and that he hoped I would win out in this injunction case. After dinner we went into my office and talked further about the matter. Mr. Lipscomb became very violent. He said: "Pickford, Talbott
245 will do anything on earth for money; he would commit murder if he had the nerve." He said: "I don't know of anything in the English language to properly describe him, and," he says, "I can only think of one thing, and that is a man who would barter his mother's virtue for a price and then cheat her out of her share." I said, "Lipscomb, would you have any objection to making these remarks in the presence of Mr. Newman," and he said, "Not in the least." We called Mr. Newman over and he repeated his remarks. I cannot say exactly all he did say about Talbott, but that is the substance.

Mr. RIDOUT: I object to the witness undertaking to give that for which no foundation has been laid.

By Mr. MADDOX:

Q. What did he say about an amount necessary to settle the matter and expose the whole thing? A. He told me that he was willing, that he would see Hudson and get Hudson to expose the matter if it could be done without Hudson being prosecuted. But he says, "Pickford, in doing this I am defeating our own fee, and we have earned our fee." I said, Mr. Lipscomb, I am willing to pay the attorneys' fee in this matter if the thing can be exposed." He said he would undertake to expose it but there would be some cost to it. I asked him how much and he said he did not think it would exceed $500. Then he asked me if I could give him some money. I told him I had no currency present but I could give him a check. He asked for $50 and I gave him a check. That was about the 7th of March.

Q. Is that the check you gave him? (Exhibiting and referring to check of March 7, 1909 to the order of Andrew Lipscomb
246 for $50, heretofore identified by the said Lipscomb as being the same, endorsed by him and one Maurice Stein.) A. That is the check I gave him.

Q. Did he at that time say anything about your right to appeal this case to the Supreme Court?

Mr. RIDOUT: Same objection.

A. He said I could appeal this case and take it to the Supreme Court. He said, "Do this by all means for long before it reaches that point either Hopp or Hudson will squeal and the whole thing will come out."

Q. When did you see him again? A. He came to my office about a week after that, at the Toronto; a week or ten days after that.

Q. For what purpose? A. For money.

Q. How much did he ask and how much did you give him? A. He asked for a hundred dollars, or something like that; $100 or $125. He said he had good news for me; that he had seen Hudson and Hudson had told him he was willing to expose it provided he was exempt from any further prosecution. He said he had arranged that he would not be prosecuted or could not be under the law. He said he wanted to give Hudson some money. I asked him if he could not get along with $50 and he said no. I finally gave him a check for $70.

Mr. RIDOUT: The alleged testimony of Lipscomb concerning Hudson is objected to as hearsay and as not rebuttal.

By Mr. MADDOX:

247 Q. Is that the check you gave him? (indicating.) A. Yes, sir.

(The witness here identifies check of March 15, 1909, to the order of Andrew Lipscomb for $70, heretofore identified by said Lipscomb and endorsed by him to the order of Bloom, Son & Company, and by the said Bloom, Son & Company endorsed.)

By Mr. MADDOX:

Q. Mr. Lipscomb has stated in his testimony he supposed you had given him these checks as a sort of fee or retainer for some manslaughter case. What is your recollection about that? A. I never had a word with him in reference to a manslaughter case. The conversation was practically all there at the house, and such a case was never mentioned.

Q. He also said that either one or both of these checks might have been given him in consideration of his advice in relation to appealing this case to the Supreme Court. What have you to say about that? A. Not a bit of it. Both moneys were paid to him for having Hudson expose this matter with the distinct understanding I would never say anything about it and would treat the matter confidentially. I never mentioned it to any one until a couple of months ago when I found out Lipscomb did not expose it after agreeing to do so. Then I sent the checks to you, in December.

248 Q. Was either one of these checks given at Lipscomb's office? A. No, sir; they were both given in the Toronto Apartment House where I had my office.

Q. Your office was there at that time? A. Yes, sir.

Q. They were both written and given to him up there? A. Right there; yes, sir.

Q. On the occasions you have mentioned? A. Yes, sir.

Q. And when he came to see you? A. Yes, sir.

Q. How long was it after you gave these checks to Mr. Lipscomb that you communicated that fact, or anything in relation to it, to your counsel?

Mr. RIDOUT: Same objection.

A. It was six or eight months afterwards before I said anything to anybody.

Cross-examination.

By Mr. RIDOUT:

Q. Mr. Pickford, you discovered that Lipscomb was very hostile to Talbott; did you not? A. Yes; he claimed Talbott was trying to beat him out of his fee.

Q. And taking advantage of that situation you paid him money to betray Talbott? A. No, I did not.

Q. What was the money paid him for? A. For Hudson to expose the transaction that he and Talbott were in.

249 Q. Was that intended as a bribe to Hudson? A. No; I had no intention of bribing him.

Q. What did you suppose he was going to do with it? A. He was only to act as an attorney to defend Hudson in case of his arrest.

Q. I understood you to testify that Hudson claimed he must have compensation. A. Lipscomb said Hudson would require some compensation, but not more than $500.

Q. What was the $500 intended to pay for? A. I did not know what he would use it for, whether to give to Hudson direct, or whether he would keep it as a fee for defending Hudson if he got in trouble.

Q. Did you arrange that Lipscomb was to be paid his fee in any event? A. I arranged not only for Lipscomb, but he was to speak to the other attorneys, and if Talbott's case was exposed I would pay the attorneys' fees.

Q. And then you waited six months and finally communicated your version of this affair to Mr. Maddox? A. Yes, sir.

THOMAS H. PICKFORD.
By the Examiner by Consent.

Whereupon CHARLES R. NEWMAN, called as a witness in rebuttal, having been first duly sworn testified as follows:

By Mr. MADDOX:

250 Q. Mr. Newman, do you know Mr. Thomas H. Pickford? A. Yes, sir.

Q. How long have you known him? A. Fifteen years or more.

Q. Are you also acquainted with Mr. Lipscomb? A. Yes, sir; and have been for a longer time.

Q. Did you know of this suit between Mr. Talbott and Mr. Pickford resulting in a judgment of $8500? A. Yes, sir.

Q. What did you know about it?

Mr. RIDOUT: Objected to as not rebuttal.

A. Mr. Pickford talked it over with me.

By Mr. MADDOX:

Q. What did he say about it?

Mr. RIDOUT: I object. Surely, Mr. Maddox, you do not want to encumber this record with private conversation.

By Mr. MADDOX:

Q. What did he tell you? A. He told me he was the victim of a fraud; that a job had been put up on him. He asked me if I knew Lipscomb and I said yes. He asked me what kind of a man he was and I told him I thought he was all right. He asked me if I would see Lipscomb and see if something could not be done. I said yes, I would see Lipscomb; and in view of that conversation I did go and see Lipscomb and I said to him, "Mr. Pickford feels that he has been the victim of a fraud. He does not hold"——

Mr. RIDOUT: I object to any conversation between Mr. Newman and Mr. Lipscomb.

251 By Mr. MADDOX:

Q. Go ahead. A. I told him that Mr. Pickford considered himself the victim of a fraud, that a job had been put up on him by these three men, Talbott, Hopp and Hudson, and while he did not hold the attorneys responsible, and did not blame them in any way and he would see that their fees were paid, still he felt he was the victim of a fraud and he wanted it exposed. I said, "If there is anything you can in honor do, we want you to do it." He said, "Well, what can I do?" I said, "That is for you; you must know. I do not know what to do under the circumstances; that is for you." He seemed to think it over.

Mr. RIDOUT: All conversation between Newman and Lipscomb is objected to as not rebuttal.

A. We had a number of conversations, one after another, a number of days. He seemed to be more favorable to Pickford all the time and seemed to think Mr. Pickford had been the victim, if not of a fraud——

Mr. RIDOUT: I object to Mr. Newman seeming to think.

By Mr. MADDOX:

Q. Go ahead. A. He seemed to grow more favorable to Mr Pickford all the time, and he seemed to think that Mr. Pickford was wrongfully used, and all that sort of thing. He just went on from day to day that way, that he was going to see if he could do something, but nothing was ever done. Finally one day he and I made

an engagement, or an arrangement of some kind, to go and
252 see Mr. Pickford at the Toronto Apartment House. Several weeks had gone on when we went to see Mr. Pickford at the Toronto, the occasion to which Mr. Pickford has referred. I was present at the time. After we had been there a little while dinner was announced—the bell rang or something—and Mr. Pickford invited us to dinner. We sat there at dinner and talked, the conversation being on the subject of Talbott. It was principally carried on by Mr. Lipscomb. He was a little violent that evening. Mr. Pickford suggested he would like to offer Mr. Lipscomb something to drink, but he had nothing there in the house, and Mr. Lipscomb said, "Really, I don't care; I haven't touched anything for four months."

When we finished dinner we walked out into the hall, or the parlor or reception room. I thought I would draw back, and I drew back out of hearing, so that they would be at liberty to talk together. Finally Pickford called me to where he was. Mr. Lipscomb was extremely violent at the time. He was denouncing Mr. Talbott with everything he could lay his tongue to. He used that language. It is not necessary to repeat that language, is it?

Mr. RIDOUT: Yes; tell us what he said.

A. That is absolutely what he said. It made the most horrible impression on me. It is not necessary, surely, for me to repeat it? I will swear what Pickford said was the truth.

Mr. RIDOUT: Yes, go ahead.

A. He said that he was a man who would sell his own
253 mother's virtue, and then rob her out of her share of the price. Then Mr. Lipscomb commenced to advise Mr. Pickford in my presence about the conduct of the case. But that remark impressed me forever, it would impress any man; it was horrible. There were a number of other things he said that were frightful in their denunciation, but nothing like that. Then he commenced to advise Mr. Pickford about the conduct of this case. Mr. Pickford went off and drew a check; I do not know the amount of it. But he drew a check and handed it to him and Lipscomb took it.

By Mr. MADDOX:

Q. You were not present when the second check was given? A. No, sir.

Q. Did you subsequently see Mr. Lipscomb about this matter? A. Well, I saw him several times; I saw him a number of times after this thing occurred and before it occurred.

Q. Nothing came of these efforts, as far as you know, to get the fraud exposed? A. No, sir.

Q. In the conversation between you and Lipscomb was anything said about Hudson?

Mr. RIDOUT: Same objection, as not being rebuttal.

A. On one occasion he and Mr. Pickford were talking in his office;
it was then on F street, between 14th and 15th, in the Glover
254 Building. And he came to explain to Pickford why he took an interest in Hudson. He spoke of Hudson being poor, down

and out, and that sort of thing; that he also was a member of the same secret organization of which he was a member, and that as a brother member he took an interest in him. And it was either on that occasion or later (I don't remember about that now) he told him he would see Hudson. But he and myself never personally discussed Hudson.

Q. You did not? A. No, sir; we did not; but he had discussed with me repeatedly, time and time again, his other client, Mr. Talbott.

Cross-examination.

By Mr. RIDOUT:

Q. He conveyed to you, did he not, the impression that he was bitterly hostile to Talbott? A. Yes, sir; he was quite hostile, as hostile as a man could be. You can imagine, Mr. Ridout, from that remark.

CHARLES A. NEWMAN,
By the Examiner by Consent.

Mr. MADDOX: That is all.

Mr. RIDOUT: Is that your case, gentlemen?

Mr. MADDOX: Yes.

Mr. RIDOUT: I shall have a little sur-rebuttal.

255 Mr. MITCHELL: On Thursday, at three o'clock, I would like to take testimony on the intervening petition.

(Thereupon, at 3:45 o'clock, p. m., the further taking of testimony was adjourned until Thursday, February 10, 1910, at 3 o'clock, p. m.)

WASHINGTON, D. C., *February* 24, 1910—4 o'clock p. m.

Met, pursuant to agreement, at the office of Samuel Maddox, Esq., Washington, D. C.

Present, on behalf of the complainant Pickford, Mr. Maddox.

Present, on behalf of the defendant Talbott, Mr. Ridout.

Whereupon THOMAS H. PICKFORD, having been previously sworn as a witness, was recalled for further

Direct examination.

By Mr. MADDOX:

Q. Where was your office in December, 1908, and January, 1909? A. In the Toronto Apartment House.

Q. Did you have a down-town office? A. No, sir.

256 Q. When did you rent an office in the Colorado Building? A. April 15, 1909.

Q. Have you a lease? (Handing paper to witness.) A. Yes sir; that is the lease.

Q. Is that the first lease you had for an office in the Colorado Building? A. Yes, sir.

Mr. MADDOX: I offer this lease in evidence.

Mr. RIDOUT: I object to it. It has no date, and it may have been written at any time.

By Mr. MADDOX:

Q. Is this the lease under which you took possession of your office in the Colorado Building? A. That is the lease.

Q. When did you first see Bernard A. Duke with respect to the matter of this attachment? A. I think it was two or three days after the Supreme Court decided the case against us.

Q. Did he come to see you? A. Yes sir; he came to see me.

Q. What did he say? A. He told me he could make a settlement with Mr. Talbott for a discount of $500.00, and that he could make a hundred dollars out of the transaction.

Q. How were you connected with this express company over in Baltimore? A. I owned some of the stock in the express company.

Q. How much? A. Two hundred and fifty dollars' worth.

257 Q. Where did you get it? A. I bought it from a gentleman by the name of McCormick. I learned afterwards that they had elected me as a director. I attended one meeting and resigned.

Q. Did you have anything to do with the business of the corporation? A. Never. I do not know a thing about it and never was there but once in my life.

Q. You had a mortgage on property that the express company wanted to buy, did you not? A. I had a mortgage; but I did not know that the express company wanted to buy any of the property I had a mortgage on. I had a mortgage on property in Baltimore for $21,000.00.

Q. Belonging to a man named Hazzard? A. Yes.

Q. When did that mortgage become due? A. That mortgage first became due in October, I think, and I extended it to January.

Q. For what purpose did Duke come to see you in connection with that? A. He told me he had a trade with Mr. McCormick for some bonds and that the only thing in the way of closing up the trade was the extension of this mortgage for three years.

Q. The mortgage which you held? A. Yes.

Q. What did you say? A. I told him if he would have

258 his friend Talbott dismiss the judgment, I would extend the mortgage for three years.

Q. Did you mention to him any number of express company bonds to be paid over to Mr. Talbott? A. No sir.

Q. Did you have any bonds? A. Not a one.

Q. Did you expect to get any? A. No sir.

Q. It has been testified in this case by Talbott that when you and he arranged to settle this matter, if possible, with the $8500 check, you went with him to see Mr. Darlington, saying I was no longer your counsel and that I did not want to go to see him. Did you say that and, if not, what did you say? A. No; I did not say that. I came to see you and you declined to have anything to do with any sttlement unless Mr. Lipscomb was present, and said if I wanted to

settle I would have to get some other counsel. Then we agreed to see Mr. Darlington.

Cross-examination.

By Mr. RIDOUT:

Q. At the period you first spoke of here, in the latter part of 1908 and the first part of 1909, you were constantly in Walter's office, were you not? A. No sir.

Q. You were frequently there? A. No sir.

259 Q. You were occasionally there? A. I don't think I have been in Walter's office, four or five times in a year.

Q. Where was Walter's office during that period? A. He had an office in the Colorado Building.

Q. Do you know the number of his room? A. No sir.

Q. Do you know the floor it is on? A. I do not.

Q. When was the last time you were there? A. I can't remember being in Walter's office twice while he had an office——

Q. That is not my question. When was the last time you were there? A. Some time about a year ago.

Q. That was the last time you were in Walter's office? A. Yes, sir.

Q. What is the number of your room now? A. My number is 1410 G street.

Q. I mean when it was on the second floor of the Colorado Building. A. 222.

Q. Isn't it a fact that when you came out of the elevator you could not help seeing Walter's sign right in front of you? A. No, sir; the National Realty Company had an office——

Q. What is the number of Walter's office? A. Walter's

260 room used to be upstairs. He is now on the second floor, just as you go up the stairs, with several others in the National Realty Company's office?

Q. How long has he been there? A. I can't say; but probably three or four months or maybe longer. I never was in the office but twice.

Q. How often have you been in to see him in the Washington Realty Company's office on the same floor? A. I did not know that the Washington Realty Company had an office there.

Q. You never have seen Walter in that office? A. No; it is the National Realty Company's office.

Q. You never have seen Walter or visited him in the Washington Realty Company's office which is on the same floor? A. No. Never that I remember.

Q. When you had your conversation with Duke—where did you say you had it? A. We were at the District Title Company's office and at Mr. Darlington's office, and I was once to the office in which Mr. Duke was.

Q. What did you go there for? A. I went there with Mr. Talbott and Mr. Duke.

Q. Who first came to see you on that occasion? A. Mr. Talbott was the first one that came.

Q. Where did he find you? A. At the Toronto Apartment house.

261 Q. Then you and he walked to Duke's office? A. No. The next day we went to Mr. Darlington's office.

Q. I understand you to say that you came here and called on Mr. Maddox and that Mr. Maddox declined to take part in some transaction because he thought it would be unprofessional in the absence of Mr. Lipscomb. A. Yes, sir.

Q. And thereupon, you and he agreed to refer the matter to Mr. Darlington?

Mr. MADDOX: No; he did not say that.

The WITNESS: No sir; that is not what I said. I said that was the reason Mr. Talbott and I agreed to go to Mr. Darlington's office.

By Mr. RIDOUT:

Q. You went to Mr. Darlington's office—no matter who suggested it—because you had been advised by Mr. Maddox that the matter was unprofessional in the absence of Mr. Lipscomb? A. No; Mr. Maddox did not say anything to me about it being unprofessional. What he said to me was that he could not have anything to do with this case unless Mr. Lipscomb was present.

Q. After receiving that information, you went to see Mr. Darlington? A. No. I then went to see Mr. Talbott and Mr. Talbott suggested Mr. Darlington's office, and we went up there.

Q. Will you swear that you did not suggest it? A. I never had had anything to do with Mr. Darlington in my life, up to that time.

262 Q. Is Mr. Darlington your counsel now? A. Yes; now he is. But this is the first case he ever had anything to do with for me.

Q. Did you consult him about this case in which you are now testifying? A. No sir.

Q. Never? A. Never.

Q. Then he never was your counsel? A. No sir.

Q. Now tell me what transpired between you and him at his office; what you said, and what he said when you went there? A. When we went there we didn't see Mr. Darlington; we saw a young man——

Q. You know perfectly well who that young man is; do you not? A. I do not know. I can't tell you his name; I know he is in the office. I think I have only been three times to Mr. Darlington's office.

Q. Go on and narrate what occurred. A. I told him that our business was to settle up this judgment and asked him if he would not send over or go over to the record office and see if everything was right. Mr. Talbott told him he had transferred the judgment to his son, and he went over and got a record of it and brought it back; and while we were talking about it Mr. Darlington came in

and we stepped into his private office with him. He said he could not have anything to do with the case.

263 Q. Did he say why? A. Unless Mr. Lipscomb was present.

Q. What did you tell him you wanted to do? A. I told him we wanted to settle that judgment.

Q. When did this interview occur? A. I can't recollect the date; but somewhere about the first of the year 1909.

Q. After the affirmance of the judgment had been announced by the Supreme Court? A. Yes. I think it was the same day that the check was drawn. In fact, I remember now that some one suggested that I bring the certified check with me; and I sent over to the bank and had the check certified.

Q. Who organized this Electric Express Company? A. I do not know. I know that Mr. McCormick was the head man in it.

Q. Where was it incorporated? A. I can not tell you that.

Q. Do you know who signed the incorporation certificate? A. No sir.

Q. Were you not the sole head and front of the organization of that concern? A. The only thing in the world I know of it is that I put up $250.00; and that was simply to accommodate Mr. McCormick.

Q. You never had any connection with it except as an accommodation to Mr. McCormick? A. I put up the $250.00 for Mr.

264 McCormick. I would not have done it, except that Mr. McCormick and I once went over there——

Q. What did you go there for? A. They had a meeting and he asked me to come over there.

Q. Whom did you meet there? A. I met a man by the name of Mr. McNeill and several others; but their names I cannot tell you. I know they had a meeting and a vote.

Q. Where was the meeting held? A. At the Terminal Station in Baltimore.

Q. When was that? A. Right in Baltimore.

Q. When was it? A. That was last year. I should say it was the last of September, as near as I can remember.

Q. When did you say you resigned as a director? A. Just after that one meeting.

Q. When did you first learn that you had been elected a director? A. I didn't learn it until three days after I went over there.

Q. How did you learn it? A. Mr. McCormick told me that they had made me a director. I told him they ought not to have done it, as I had no time to attend to it and knew nothing about it.

Q. You have no interest at the present moment in that concern? A. Just this $250.00.

265 Q. That is all? A. Yes.

Q. You have no present interest in any form? A. No sir.

Q. It was altogether the enterprise of some other persons? A. Yes sir.

Q. And the whole thing was conceived and carried out by somebody else? A. Yes sir.

Q. And your proposal was simply for the accommodation of Mr.

McCormick? A. For Mr. McCormick; yes sir. He guaranteed that I would not lose anything by it.

Q. Was that in writing. A. I won't say that it was in writing.

Q. If it was in writing, I would like you to produce it as part of your examination. A. He told me he would guarantee me not to lose anything by it.

Mr. RIDOUT: If that is in writing, I want it as part of this examination.

THOMAS H. PICKFORD,
By the Examiner by Consent.

Mr. MADDOX: The lease referred to by the witness was entered into—the date not given—between T. A. Wickersham, agent for Thomas F. Walsh, and Thomas H. Pickford, and provided
266 for the rent of the room 222 in the Colorado Building for six and one-half months, beginning on the 15th day of April, 1909.

With this statement, it is agreed between counsel that the lease itself may be withdrawn from the files.

267 *Depositions in Sur-rebuttal for Defendants.*

Filed February 15, 1910.

In the Supreme Court of the District of Columbia.

Eq. No. 28244.

THOMAS H. PICKFORD et al.
vs.
HENRY MAURICE TALBOTT et al.

Pursuant to agreement the parties to the above-entitled cause, by their respective solicitors, (viz: John Ridout, Esq., for defendant H. Maurice Talbott; Samuel Maddox, Esq., for complainant Pickford; Henry E. Davis, Esq., for complainant Walter; and F. Edwin Mitchell, as intervenor, with his solicitor Edwin Forrest, Esq.,) came before me, A. Johns, Examiner in Chancery, at the office of John Ridout, Esq., 344 D. St. n. w., Washington, D. C., at 2 o'clock p. m., of Thursday, February 10, 1910, for the purpose of taking testimony in sur-rebuttal on behalf of the defendants.

Whereupon, defendant HENRY MAURICE TALBOTT, was recalled and testified in sur-rebuttal as follows:

Direct examination.

By Mr. RIDOUT:

Q. Please state when, if at all, you first saw Mr. Pickford after the affirmance, by the Supreme Court of the United States, of the judg-

ment in your favor, which is the subject-matter of controversy in this case. A. A few days after the affirmance.

Q. Why did you call upon him? A. I had a communica-
268 tion from Mr. Bernard Duke, in the Colorado Building, that Mr. Pickford——

Mr. DAVIS: The contents of this communication are objected to, no foundation for secondary evidence having been laid.

(Answer continued:) —would be willing to settle the judgment provided I would make a small discount, and wished to meet me.

Q. What did you do pursuant to that information, and when? A. Shortly after that I met Mr. Pickford in Mr. Duke's office in the Colorado Building, and we discussed the matter.

Mr. DAVIS: This is objected to as not being sur-rebuttal of anything testified to by any witness in rebuttal.

(Answer continued:) We discussed the matter, and he then offered to cash this judgment if I would discount it $500. The suggestion was made that I was in some trouble with my counsel, and that the fee which would be coming to him would have to be arranged for in this settlement. After considerable discussion at that time, it was left over for a subsequent meeting.

Q. Did you, or not, on that occasion say to Mr. Pickford, either in these exact words or in substance, as is testified to by him on page 5 of his testimony, as follows: "He asked me if I would not settle with him direct, stating that Lipscomb and Hudson were the parties that put up this job on me and he had only heard of it or learned of it recently."

Mr. DAVIS: Objection repeated, as the occasion now inquired
about does not appear to be the occasion at which the witness
269 testified as to the use of the words quoted.

A. No, sir. Neither at that time nor at any other time did I say to Mr. Pickford or to anybody else that any job had been put up on him, or that I knew of any job. Nor did I say that Hudson or anybody else was in a conspiracy of any kind, nor did I know it. Nor did I say to him that I wanted to have a settlement with him direct, nor anything that could be twisted or distorted by any one into meaning that.

Mr. DAVIS: All of this answer, except the opening words, "No, sir," is objected to for reasons already stated, and for the further reason that the answer is not responsive, and also is in excess of the question.

Q. Mr. Talbott, did you, or not, at that time or at any other time know of or speak of any conspiracy or job as between Lipscomb and Hudson, or anybody else, in respect of either Pickford, Walter, Bradshaw, or Shaw?

Mr. DAVIS: Objected to as not sur-rebuttal, and for reasons before given.

A. No, sir; I did not.

Q. Do you now know of any such conspiracy or job?

Mr. Davis: Objection repeated.

A. Nor do I now.

Q. When next did you see Mr. Pickford in connection with this controversy? A. A few days afterwards.

Q. Where? A. When we met again at Mr. Duke's office in the Colorado Building, and went over to Mr. Pickford's office, which was also in the Colorado Building, when the terms of settle-
270 ment were practically agreed upon.

Mr. Davis: Answer objected to as not sur-rebuttal.

Q. Was Mr. Duke present at that conversation?

Mr. Davis: Same objection.

A. Duke was present at the beginning of the conversation in his office, but my recollection is that he was not present at the last of the talk.

Q. At that conversation did you agree upon the terms of settlement? If so, what were they?

Mr. Davis: Objection repeated.

A. My recollection is that at that conversation we had practically agreed upon the terms of settlement, which were to be that Mr. Pickford was to pay the judgment and costs less $500 and a sum that was still unsettled to be retained and deposited in some bank subject to the check of Mr. Pickford and myself, to await the result of the trial of the question as between Lipscomb and myself as to the fee.

Q. What, if anything, on that occasion did Mr. Pickford say about an attachment or garnishment process that had been served on him in regard to Mr. Lipscomb's fee?

Mr. Davis: Objection repeated.

A. He told me in one of these conversations that an attachment had been in his hands as garnishee for Lipscomb's fee.

Q. When did you next see him, and then what occurred?

Mr. Davis: Objection repeated.

A. At that time the suggestion was made that he would go to his lawyers, without naming them, and have the agreement drawn
271 by which the matter was to be carried out. He had with him at the time a certified check for $8500——

Q. On what bank? A. On the Commercial National Bank—drawn to his own order, and a roll of gold certificates which he threw on the desk, stating that he had the stuff to settle it up with. I took the check and some of the money, I think, in my hands, and saw that the check was drawn to his own order. I then told him that I could not go with him down to Mr. Maddox's office because, for some reason or other, Mr. Maddox had made a personal matter of this lawsuit and that he seemed to me to be in some way quite hostile to me, so that I could not go to his office. His answer to that was that he did

not intend to go with me to Mr. Maddox's office; that he did not consider Mr. Maddox and Mr. Davis as his lawyers in the matter at all; that Mr. Lipscomb had made babies of them, and that, so far as he was concerned, he never expected to employ them any more in cases of that kind; that he did not want that kind of attorneys. After considerable of that kind of talk, he informed me that he had employed Mr. Darlington, and wanted to know if there was any objection to my going down to Mr. Darlington's office. I told him no; that so far as I knew, there was no objection to my going to Mr. Darlington's office. So we went to Mr. Darlington's office, and I think Mr. Bernard Duke went with us. When we arrived at his office, Mr. Darlington was not in, and Mr. Pickford talked with Mr. Sullivan; I heard part of that talk; Mr. Pickford was telling him what the agreement was, and Mr. Sullivan evidently intended to prepare the written agreement, but while they were discussing it Mr. Darlington came in, and then Mr. Pickford, Mr. Darlington
272 and Mr. Sullivan went into the back room. Shortly afterwards Mr. Pickford came out, Mr. Darlington with him. Mr. Darlington said nothing when they came out, but Mr. Pickford quietly said that Mr. Darlington declined to have anything to do with it; said that he didn't think it was quite the thing for him to remain in a case of that kind and wouldn't have anything to do with it. Mr. Pickford then suggested that we go up on 13th street, I think, up to the Title Co.'s office where a gentleman by the name of Allen would probably prepare the paper. We went up there, but I don't recollect just what took place up there, but Mr. Allen did not prepare the paper.

Q. Can you fix the date of that occurrence, that visit to Mr. Darlington's office?

Mr. DAVIS: Objection repeated.

A. It was before the mandate came down from the Supreme Court, and possibly two or three weeks after the decision of the Supreme Court.

Q. As nearly as you can say, how long was it prior to the filing of this bill?

Mr. DAVIS: Objection repeated.

A. Not more than a few days, because in that same conversation he told me that Mr. Maddox had some information from the Judge, as he expressed it—he did not say which Judge—from Kilgour. He didn't say what information he had, nor did I ask him.

Q. Since the institution of this proceeding have you, or not, had any other conversation with Mr. Pickford concerning the settlement of this case?

Mr. DAVIS: Objection repeated.

273 A. Yes, sir.

Q. Narrate that in the order of time, as nearly as you can.

Mr. DAVIS: Objection repeated.

A. After the bill was filed I got a further communication from

Mr. Duke that Mr. Pickford was ready to settle the matter if I was in a position to talk with him, and would be glad to have me call upon him. I called on him twice, I think, possibly three times. The last time I went to the Toronto apartment house; he was not there. Then I telephoned up to his house; he asked me to come up, and I went up to his house. He then made a proposition — in fact, I think the proposition was made at a preceding meeting—a very peculiar proposition, one that I couldn't tell just exactly what he wanted to do, but it looked to be practically cutting the judgment in half, in other words, paying me about one-half of it. When I went up to his house, at the last meeting I had with him, he told me he had a check for $2500 and would give me a note for the balance. On that theory he was simply to buy whatever interest I had in the judgment. I declined it and left, and have not had any conversation with him since.

Q. Has, or not, any proposition recently been made to you by Mr. Pickford, or by any representative of or messenger from him, concerning the settlement of this judgment?

Mr. Davis: Objection repeated, and objection is made to any statement about to be made by the witness touching a messenger, for the reason that the authority of the supposed messenger does not appear.

A. Within the past thirty days Mr. Bernard Duke, representing himself as an agent of Mr. Pickford——

274 Mr. Davis: Objection again repeated.

(Answer continued:) —has offered me for the settlement of this judgment twelve $1000 bonds of the Washington & Baltimore Electric Express Co., which he represented to be worth par, and on which he said 80% could be borrowed. I informed Mr. Duke that the amount of the judgment and costs and interest was now, in round numbers, about $11,000, and that if those bonds would bring $11,000 I would accept them, but that if they would bring $10,995 I would not.

Q. At that time was, or not, any prospectus or literature showing the supposed value of these bonds shown you by Mr. Duke?

Mr. Davis: Objection repeated.

A. Nothing, except the deed of trust securing those bonds was handed to me, with the statement that they were worth par.

Q. Did, or not, Mr. Duke tell you what connection, if any, Mr. Pickford had with the Company you have spoken of?

Mr. Davis: Objection repeated.

A. I am not sure that he told me just how Pickford was connected with it, but I understood——

Mr. Ridout: I only wanted to know what he told you.

Note.—Cross-examination waived.

H. MAURICE TALBOTT.

275 JAMES HUDSON was recalled in sur-rebuttal and testified as follows:—

Direct examination.

By Mr. RIDOUT:

Q. Mr. Hudson, has, or not, Mr. John H. Walter seen you within the last twelve or eighteen months with respect to the settlement of your suit against Mr. Pickford or with respect to any action to be taken by you in this case?

Mr. DAVIS: Objected to as not sur-rebuttal.

A. Yes, sir; he came to me about a year ago, and we got talking about this matter, and he said it would be easier to settle without lawyers than with lawyers; that it was always expensive. We talked further in that way, and then he told me he had $500 in his pocket to give me if I would make an affidavit similar to the one they had received from Kilgour.

Q. Did he tell you the contents of the affidavit of Kilgour?

Mr. DAVIS: The same objection.

A. No, sir. I stopped him right there, and told him if he had come to me for any such purpose as that he had come to the wrong place. He then turned it off by saying that he did not mean that, but he meant to give me $500 in settlement of my case, which I refused.

Q. Do you know whether or not any one was present at that conversation?

Mr. DAVIS: Objection repeated.

A. No one was present at the conversation. He came to my office where my man was with me at work. He heard me address
276 him as Mr. Walter, and heard Mr. Walter's request for a private conversation with me, and saw us go out of that room into my private room.

Q. What is the name of that man?

Mr. DAVIS: Objection repeated.

A. H. I. Keifer.

Q. Where is he now? A. He is at work in my office now, I think.

Q. On page 8 of the testimony of Mr. Pickford he testifies that Mr. Lipscomb, at the time when he came and asked for a hundred dollars, said to him "that he had seen Hudson and Hudson had told him he was willing to expose it provided he was exempt from any further prosecution." Please state whether or not you ever made any such statement as that to Mr. Lipscomb.

Mr. DAVIS: Objected to as not sur-rebuttal and not seeking to elicit anything in any sense contradictory of the testimony quoted.

A. No, sir.

Q. At that time, or at any previous or subsequent time, did you,

or did you not, know of anything to expose to Mr. Lipscomb or through Lipscomb to Mr. Pickford in connection with this controversy?

Mr. DAVIS: Objected to as not sur-rebuttal and as not calling for any matter possibly contradictory of anything testified in rebuttal.

A. No, sir.

NOTE.—Cross-examination waived.

JAMES HUDSON.

277 BERNARD A. DUKE was called as a witness for defendants in sur-rebuttal, and, having been duly sworn, testified as follows:

Direct examination.

By Mr. RIDOUT:

Q. Mr. Duke, are you acquainted with Mr. Thomas H. Pickford? A. Yes, sir.

Q. How was your office located with reference to his in January and February of 1908 and 1909, respectively? A. His office was opposite and three or four doors south of mine.

Q. Do you know Mr. John H. Walter? A. Yes, sir.

Q. Please state whether or not Mr. John H. Walter made any request of you in respect of your procuring a settlement of the judgment in favor of H. Maurice Talbott against Mr. Pickford, and tell us what you did.

Mr. DAVIS: Objected to as not sur-rebuttal.

A. Mr. Walter came up to see me and said he and I could get a fee from Mr. Pickford if we could effect a compromise between Pickford and Talbott, and for me to go and see Mr. Pickford; so I went to see him.

Q. State what Mr. Pickford said to you.

Mr. DAVIS: Same objection.

A. So Mr. Pickford wanted to know if I could get Mr. Talbott to cut his claim down about $500. I told him I would find out. So I wrote Mr. Talbott to come down; so he came down to my
278 office, and I went over and saw Mr. Pickford and told him Talbott was in my office, and invited him to go over and see him; he came to my room, and then they both went to Mr. Pickford's office. Mr. Pickford and Mr. Talbott talked about the case.

Q. Did you go with them when they went to Mr. Pickford's office? A. No, sir.

Q. When next did you see Mr. Talbott and Mr. Pickford together?

Mr. DAVIS: The same objection.

A. Mr. Talbott came back——

Q. You cannot tell anything he said when he came back unless Mr. Pickford was present. Did Pickford come back with him? A. No; but he came back afterwards.

Q. State what he said in Mr. Pickford's presence. A. It wasn't in Mr. Pickford's presence.

Q. When did you next see Talbott and Pickford together?

Mr. DAVIS: Same objection.

A. Next day.

Q. Were you present at that conversation? A. No, sir.
Q. When did you next see them together?

Mr. DAVIS: Same objection.

A. Mr. Talbott came in about it next day, and I went over and told Mr. Pickford he was there, and he told me to tell Mr. Talbott to come over there.

Q. Come down to the point. A. So that went on for several days.

Mr. DAVIS: All this comes in under my objection.

279 (Answer continued:) Finally Mr. Pickford and Mr. Talbott and myself talked about how to fix this thing up so as to protect Mr. Pickford from having to pay Mr. Lipscomb's fee; I suggested that they deposit the money to the joint credit of Mr. Talbott and Mr. Pickford and somebody in the United States Trust Co., to await any suit that might be filed on account of the attachment that had been thrown into Mr. Pickford's hands, and so protect Pickford as well as Talbott against paying out this money. So that seemed to satisfy Mr. Pickford, and we came down to see Mr. Darlington to see about getting some sort of paper drawn up that would relieve Mr. Pickford of paying this fee. We went in to Mr. Darlington's office and waited for some time because Mr. Darlington was not there. Finally we told Mr. Sullivan what we wanted, and he said if Mr. Darlington didn't come in he might take it up himself. Finally Mr. Darlington did come in, and Mr. Pickford and Mr. Darlington talked together; what they said I don't know. From there we went up to the office of the District Title Co. to have them do for us what they could; they sent a man around to the Court House to examine the records and find out how much the costs would amount to, and they were to draw up some papers, but for some reason or other they never went back to find out what could be done.

Q. Whom did you see at the District Title Co.'s?

Mr. DAVIS: The same objection.

A. Mr. Allen.

Q. On the occasion of the visit to Mr. Darlington's office what, if any, reason did Mr. Pickford give for coming there?

280 Mr. DAVIS: The same objection.

A. He said he was going down to his attorney's to have his attorney draw up the papers—that was all.

Q. In the course of that conversation or any other conversation what, if any, allusion did Mr. Pickford make to his purpose to employ Mr. Lipscomb to represent him in any case?

Mr. DAVIS: The same objection.

A. I don't remember as to that part.

Q. Coming down to the recent occurrence to which Mr. Talbott

has alluded, why did you go to see him about settling this judgment with certain bonds?

Mr. Davis: Same objection.

A. I will have to go back to another matter and bring that in.

Mr. Davis: Same objection.

(Answer continued:) In making a deal with E. W. McCormick and Mr. Hazzard, Mr. Hazzard owned seventy acres of ground near Baltimore, in Baltimore county, known as Westport, a summer resort.

Q. Tell me what Mr. Pickford said to you, if anything, which led you to go to see Mr. Talbott.

Mr. Davis: Same objection.

A. He says "I hold the key of the situation; I hold a mortgage on Mr. Hazzard's place, and control the Express Co."

Q. Then what did he say? A. He says "if you will give Talbott $12,000 worth of these bonds (Electric Express) and get that suit dismissed against me, I will let this deal go through," the Westport deal.

281 Q. Then what did you do with reference to telling Mr. Talbott?

Mr. Davis: Same objection.

A. I went up stairs at my office and telephoned to Rockville, to Mr. Talbott, to come right down, that I wanted to offer him a settlement in the Pickford case. He came down, and I told him what it was, that I was to give him $12,000 worth of these bonds, and I gave him a copy of the deed of trust unsigned.

Q. What, if anything, did you tell him about Pickford's relation to the enterprise?

Mr. Davis: Same objection.

A. I turned the papers over to one of the directors of the Company.

Q. Had the original deed of trust been executed and recorded, if you know?

Mr. Davis: Same objection.

A. No, sir; not at that time.

Q. Has it since been?

Mr. Davis: Same objection.

A. I don't know whether it has since been or not.

Q. To come back a moment to the interviews between Mr. Pickford and Mr. Talbott, do you recall any occasions when checks or money was produced in your presence by Mr. Pickford and shown to Mr. Talbott?

Mr. Davis: Objection repeated

A. Yes, sir; he showed a certified check for $8500.

Q. On what bank? A. I think on the Commercial National Bank.

282 Q. Do you remember to whom it was payable?

Mr. DAVIS: Same objection to all this.

A. I don't know whether it read "Pickford" or "myself."

Mr. RIDOUT: Mr. Maddox, I give you notice to produce that check.

Q. When was that, as nearly as you can fix it?

Mr. DAVIS: Objection repeated

A. Either the last of December 1908 or toward the early days of January 1909.

Q. In what office were you when that check and money were exhibited?

Mr. DAVIS: Same objection.

A. Mr. Pickford showed it to me in his office, and showed it to Mr. Talbott and me in the District Title Co.'s office and at Mr. Darlington's.

Q. Who was present when it was exhibited in the District Title office?

Mr. DAVIS: Same objection.

A. Pickford and Talbott.

Q. Do you know whether he showed it to Mr. Darlington or Mr. Sullivan?

Mr. DAVIS: Same objection.

A. I don't know whether he did or not.

Cross-examination.

By Mr. DAVIS:

Q. Mr. Duke, where *to* you live? A. Sir?

Q. Where do you live? A. Glen Echo, Md.

283 Q. Have you ever lived in Washington? A. O, yes.

Q. Where have you been living for the past five years? A. Washington and Maryland.

Q. Are you living in Washington now, or at Glen Echo? A. Maryland.

Q. From this time back how long have you been living at Glen Echo? A. I don't know exactly.

Q. Where were you living in the latter part of 1908 and early part of 1909? A. Maryland.

Q. What is your business? A. I am with C. J. Ubhoff, in the Colorado Building.

Q. In what capacity? Doing what? A. I am just working for him and looking after his office.

Q. What is his business? A. Real Estate.

Q. What were your relations to Mr. Ubhoff at that time—clerk, or what? A. Clerk.

Q. Doing what? What kind of a clerk? A. Drawing different papers for him.

Q. Are you a lawyer? A. No, sir.

Q. I wish you would define your business a little more clearly.

What kind of papers did you draw for Mr. Ubhoff? A. Receipts, notes, deeds of trust, deeds, mortgages, leases.

284 Q. Were you on a salary, or did you have an interest in the business? A. No interest in the business.

Q. On salary? A. Yes.

Q. Regular salary? or did you get commissions? A. Just got a little salary.

Q. No commissions? A. No, sir; not for drawing papers.

Q. Where were you born? A. New York.

Q. How long have you been living in Maryland and Washington, together? A. I guess 25 or 30 years.

Q. During that time have you been in business on your own account? A. No, sir.

Q. What have you been doing during that 25 or 30 years? A. I went to school and was with Charles A. McEwen——

Q. How old are you now? A. Thirty-seven.

Q. How long have you been in business in any capacity, for yourself or for anybody else? A. I guess about 15 or 18 years.

Q. What sort of business? A. I was with Charles A. McEwen in the real-estate business, clerking for him.

Q. Anybody else? A. With Mr. De Lashmutt in the bonding business.

285 Q. In what capacity? A. Running down here to the courthouse to place bonds.

Q. Ever been employed by anybody besides McEwen, Ubhoff and Mr. De Lashmutt? A. Those are all I think of.

Q. So that during the time you have been living in Maryland and Washington you have been clerking at one time or another for these different gentlemen in the different capacities you name: is that right? A. Yes, sir.

Q. On a salary always? A. Yes, sir.

Q. How long have you known Mr. Pickford? A. I guess about five or six years.

Q. How long have you known Mr. Walter? A. About the same time.

Q. Did you ever have any business with either one of them? A. With Mr. Walter, yes.

Q. What kind of business? A. I have done little things of a personal nature for Mr. Walter.

Q. Did you ever have any business at all with Mr. Pickford? A. No, sir.

Q. Was there ever anything, in any relation you ever had with Mr. Pickford, that should prompt him to select you for this sort of business you have been describing?

Mr. RIDOUT: Objected to because it is not competent to
286 call upon the witness to exercise the attribute of Divine Providence in reading the mind of Mr. Pickford, whose ways are past finding out.

Mr. DAVIS: It might be conceded that Divine Providence is out of the existing case.

A. That is a personal matter that concerns me.

Q. Is that all the answer you wish to make?

The WITNESS: May I ask a question?

Mr. RIDOUT: Ask any question you please in a tone we can all hear.

The WITNESS: I have answered the question.

NOTE.—The question was read by the Examiner.

Mr. RIDOUT: That requires an answer of yes or no.

A. Yes.

Q. Outside of matters of a personal nature, did you ever have any transaction with Mr. Walter that could be called a business transaction? A. Yes.

Q. What kind of business? A. I collected some notes for him.

Q. Mr. Duke, you have never had an office of your own, have you? A. No, sir.

Q. During the time covered by your residence in Washington and Maryland you have been employed in the performance of odds and ends in the employment given you by the different gentlemen you have named, and that is all you have been doing, isn't it?

Mr. RIDOUT: Objected to as unnecessary repetition and as argumentative.

287 A. Yes, sir. Mr. Pickford and Mr. Walter in the article——

Mr. DAVIS: Objected to as not responsive to my question, and as irrelevant and immaterial.

By Mr. RIDOUT: What were you about to say?

Mr. DAVIS: Objection repeated.

A. Mr. Walter and Mr. Pickford had wrote me up in that article in the paper; I went to see Mr. Walter about it, and he introduced me to Mr. Pickford, after having told me that they did not intend to write me up. So when he introduced me to Mr. Pickford I naturally supposed that Mr. Pickford wanted to remunerate me for the injury he had done me.

Q. What did Pickford say on that occasion about whether he wanted to write you up?

Mr. DAVIS: Objected to as not sur-rebuttal, and as not cross-examination.

A. He didn't say anything.

By Mr. FORREST:

Q. When this conversation occurred between you and Mr. Pickford, in which something was said about setting aside a certain sum in order to satisfy the claims of attorneys, that sum to be placed in the U. S. Trust Co., to the credit of Mr. Talbott and Mr. Pickford, was that amount stated at that time or at any time? A. No; the amount was not stated. It was to be an amount sufficient to protect Mr. Pickford.

Redirect examination.

By Mr. RIDOUT:

Q. Mr. Duke, do you recall the name of the Trust Co. named as trustee in the deed of trust given by the Electric Express Co.?

288 Mr. DAVIS: Objected to as not sur-rebuttal.

A. The International Trust Co. of Baltimore.

BERNARD A. DUKE.

HENRY MAURICE TALBOTT was recalled for cross-examination.

By Mr. FORREST:

Q. At the time of this conversation between you and Mr. Pickford, with respect to setting aside or reserving a certain sum in order to satisfy the claims or alleged claims of attorneys, was any amount stated that should be reserved for that purpose?

Mr. RIDOUT: I object on the ground that it is an effort to get in the terms of a compromise, and as not being material or competent.

A. That was the reason we never got to a settlement—because that was not agreed on, as Mr. Duke has stated. There was some difficulty then between Mr. Lipscomb and myself as to the fee to be paid to him. What we intended to do—that is, Pickford and myself—was to set aside a sum that would at least be abundantly sufficient to cover any possible recovery by Mr. Lipscomb.

Q. My question was whether the amount was stated. A. The sum was not agreed upon.

Q. Was any sum stated between you and Mr. Pickford, at any of those interviews with respect to this matter, that you and Pickford deemed sufficient to meet Mr. Lipscomb's claims?

289 Mr. RIDOUT: The same objection.

A. No, sir. The sum was not agreed upon.

Q. Was any sum agreed upon that you and Pickford deemed sufficient to meet any claims of Lipscomb as attorney?

Mr. RIDOUT: The same objection.

A. So far as I know, there was not.

H. MAURICE TALBOTT.

Mr. RIDOUT: Is there anything further, gentlemen? So far as I know, I am through, unless I find it impossible to procure an agreement as to certain facts, between counsel on the other side and myself; and in the event of my being unable to procure that agreement, I shall desire to call Mr. Darlington and Mr. Sullivan.

Mr. DAVIS: It being announced and understood that the remaining testimony to be taken at this hearing to day will relate to the claim of Mr. F. Edward Mitchell in respect of his right to participate in the attorneys' fees involved, counsel for Messrs. Pickford and Walter withdraw.

290 *Deposition of F. Edward Mitchell, Intervenor.*

Filed March 1, 1910.

In the Supreme Court of the District of Columbia.

Equity. No. 28244.

THOMAS H. PICKFORD et al.
vs.
HENRY MAURICE TALBOTT et al.

Pursuant to agreement the parties to the above-entitled cause, by their respective solicitors, (viz: Edwin Forrest, Esq., for the intervenor Mitchell, and John Ridout, Esq., for the defendant Talbott) came before me, A. Johns, Examiner in Chancery, at the office of said John Ridout in the Fendall Building, 344 D Street, n. w., Washington, D. C., at 3.30 o'clock p. m., of Thursday, February 10, 1910, for the purpose of taking testimony on behalf of F. Edward Mitchell as intervenor.

Whereupon said intervenor, F. EDWARD MITCHELL, was called as a witness in his own behalf, and, having been duly sworn, testified as follows:

Direct examination.

By Mr. FORREST:

Q. Mr. Mitchell, how long have you been a member of the bar? A. Since October or November, 1895.

Q. Are you personally acquainted with the parties to this equity proceeding? A. I am.

Q. Are there any of them that you are not personally ac-
291 quainted with? A. I have met all the parties, Messrs. Pickford, Lipscomb, Woodard and Mr. Talbott the father; I think I have never met the son who was, as I remember, the assignee of his father.

Q. Were you at any time connected, as attorney, with the case of Talbott v. Pickford, being a suit for damages growing out of an alleged libel? A. I was.

Q. Where was that case tried? A. In the Supreme Court of the District of Columbia, Circuit Court No. 1.

Q. Do you recall before what judge? A. Mr. Justice Wright.

Q. Before the trial of that case began had you any connection with it? A. No, not as counsel, although I had been consulted a number of times by Mr. Lipscomb, senior counsel in the case.

Q. When, if at all, did you actively take part in the trial of the cause? A. On the morning the case was called for trial and within a very short time after the jury was sworn I was called into the case.

Q. By whom? A. By Mr. Lipscomb.

Q. Who else, if any one, was associated with Mr. Lipscomb in the

case? A. I think Mr. Wm. M. Ellison was at the trial table while he and Lipscomb were attempting to conduct the case.

292 Mr. RIDOUT: Counsel for Talbott objects to so much of the answer of this witness as undertakes to give the relation of Mr. Ellison to the law case.

Q. Whom did Mr. Lipscomb represent in that case? A. Mr. Talbott, the plaintiff.

Q. Who represented the several defendants, if there was more than one? A. Mr. Samuel Maddox appeared for defendant Pickford, and Mr. Henry E. Davis appeared for John H. Walter; whether Mr. Gatley was actively engaged in the trial I do not now remember, although I think he was.

Q. After you took, or commenced to take, part in that case what did you do? A. I was standing at the rail in the court room while Mr. Lipscomb was endeavoring to get in proof of the libel. He had made several fruitless efforts, each time being met with an objection which was sustained. I went to him and suggested to him what he should ask, and he attempted to ask it as suggested, but was again met with objection, which objection was sustained. He then turned to me and said "For God's sake, Bo, come in here and help me out." I recall that at this time Mr. Maurice Talbott was not in the court room. I announced to the Court that Mr. Lipscomb desired me to enter my appearance and take part in the trial of the case. The Court informed me that I could enter my appearance at the noon recess; I did so at the noon recess and immediately entered into the trial of the case, examined the witnesses, put in the libel, and participated actively in the case until judgment—in fact,
293 until the motion for a new trial was overruled and judgment granted.

Q. How long did it take, as you now recall, to try that case? A. The best part of two days; all of one day, and I think the jury got the case about noon of the second day.

Q. You say that, according to your present recollection, when you first entered into active participation in the case Mr. Talbott was not present. Do you now recall when he first appeared on the scene? A. Not definitely. Before the noon recess, however, at the noon recess, and in the evening and the next day I consulted Mr. Talbott in regard to my participation, and about the proper manner of conducting the case, and he expressed satisfaction with the service I had rendered.

Q. When you say you consulted with him, do you mean that you talked with him more than once? A. Yes, I think several times, at recess time, that evening after court adjourned, next morning, and as the trial progressed, he being at the trial table with us from the time he came into court until the conclusion of the trial, until the case went to verdict.

Q. Were you present when the motion for a new trial was heard? A. Yes. Mr. Lipscomb and I argued that motion. Mr. Lipscomb and Mr. Ellison had argued the case to the jury at the trial.

Q. After the verdict had been reduced to judgment the case was

taken to the Court of Appeals. What, if any, part did you take
294 in its further prosecution? A. Absolutely none, for the reason that I was sort of elbowed out (if I may use that expression.) A number of times I spoke to Mr. Lipscomb about the case, but his reply would be that he was taking care of it. He never said anything to me about desiring me to retire from the case, nor did he say he wanted my help. have always stood ready to do what I could to assist in the case, and several times told him I stood ready to do anything I could to protect the judgment, in the securing of which I had participated, through the Court of Appeals and to the Supreme Court of the United States.

Q. After the affirmance of the judgment by the Court of Appeals what, if any, participation did you have in its prosecution in the higher Court? A. None.

Q. Were you consulted about it? A. Never consulted.

Q. Did you have any talk with Mr. Lipscomb about it? A. I asked him a number of times, as I say, how the case was getting along, what he needed, what he wanted done; and he would reply "I am taking care of that," or "It will be attended to," or "I am going to talk the matter over with you," always evading; and finally I became convinced that there was a studied effort on his part to beat me (if I might use that term) out of my share of the judgment. After the affirmance by the Supreme Court of the United States I interviewed both Lipscomb and Talbott and told them of the fact of my claim, that the claim must be respected, and that I would make an effort to hold my lien on the judgment.

295 Q. Did you, at any time prior to the filing of your petition in this case, tell either Talbott or Lipscomb what you considered would be a fair remuneration for your services? A. Yes. As I now recall, I wrote to Talbott, and he came to see me; asked me what compensation I wanted, as I recall it, while we were in a beer saloon one door from my office. I told him that Lipscomb had not treated me right in the case, and, as I recall, he agreed with me. I told him that Lipscomb had called me into the case; that I realized that he (Talbott) had not; but that I had consulted with him (Talbott) after I had been called in the case, as he knew, and that he had known of my services in the case. He said he was not there to have any trouble with Lipscomb about his fee, and asked me what I thought was a fair fee for me. I told him I had always stood ready to defend the judgment, but had been prevented by Lipscomb's denial of any opportunity to assist him, but that in view of my constant attitude of readiness to assist I thought I was entitled to a full one-third of the fee that Lipscomb should recover. He asked me then what I thought was a fair fee for Lipscomb; I told him 33⅓% was a usual fee in contingent cases; that I always charged that myself, and understood that was Lipscomb's fee.

Mr. RIDOUT: So much of the last preceding answer as undertakes to give Lipscomb's understanding is objected to as immaterial and hearsay.

(Answer continued:) I was entitled to one-third of that fee. I

went any number of times to Lipscomb, but never could get
296 any definite understanding until after the affirmance by the Supreme Court of the United States, at which time I saw Lipscomb in my office where he came after I had written him a very sharp letter; Mr. Ellison was called in; he told us his fee was 33⅓%; and he finally agreed to give me $700 as my share of that fee.

Q. That is, the fee he claimed as coming to him? A. Yes.

Q. The $700 that he stated, and which you have alleged as the amount of your claim is, or is not, that, in your opinion, a reasonable compensation for the services you rendered in that cause? A. I feel that it is very reasonable—lower than reasonable.

Q. As between you and Mr. Lipscomb, has there been any settlement of that claim? A. Absolutely none.

Q. Have you, or not, received from any one anything on account of it? A. Nothing.

Cross-examination.

By Mr. RIDOUT:

Q. I understand, Mr. Mitchell, that your claim for a fee is based on the theory that whatever fee is paid you shall, to that extent, diminish Lipscomb's fee? A. My position, Mr. Ridout, is this: I do not think Mr. Talbott is indebted to me outside of Andrew Lipscomb. I do think Mr. Talbott is indebted to me in some fee if Lipscomb should be denied all his fee; that my fee is good and should
297 be charged against Lipscomb's claim, perhaps; but outside of Lipscomb's claim I would have a claim against Talbott on a quantum meruit, the quantum meruit still being chargeable to the one-third which I understand Lipscomb claims against Talbott.

Q. I assume that your answer is correct as it is because of your taking into account the assignment from Lipscomb to Woodard which is on record. A. I am not responsible for the assumption of counsel for the defendant in this case.

Q. Why do you express a doubt as to Lipscomb recovering some fee in this case? A. The only reason why I express a doubt as to Lipscomb recovering a fee in this case is because of the fact that, from the testimony, I have heard for both sides, it seems to have been a case of dog eat dog, and I have been the unfortunate bone.

Q. Is your claim for a quantum meruit based on the theory that, for some reason or other, Lipscomb should be paid no fee? A. If for any reason Lipscomb should be paid no fee, I still would be entitled to compensation from Mr. Talbott on a quantum meruit. I understand that he claims against Lipscomb. I have heard all the testimony. I do not say that I believe or disbelieve any of it. I know that I have not been a party to any part of the negotiations or efforts to settle behind or over the back of counsel.

Mr. RIDOUT: So far as the testimony of Mr. Mitchell is intended to assert a claim against Mr. Talbott irrespective of the claim of Lipscomb, if there be such an intention on his part, the testimony is objected to as immaterial to this controversy.

F. EDWARD MITCHELL.

298 *Additional Cross-examination of Bernard A. Duke.*

Filed March 1, 1910.

In the Supreme Court of the District of Columbia.

Equity. No. 28244.

THOMAS H. PICKFORD et al.
vs.
HENRY MAURICE TALBOTT et al.

Pursuant to agreement the parties to the above-entitled cause, by their respective solicitors, (viz: John Ridout, Esq., for defendant H. Maurice Talbott; Samuel Maddox, Esq., for complainant Pickford; and Henry E. Davis, Esq., for complainant Walter) came before me, A. Johns, Examiner in Chancery, at the office of John Ridout, Esq., 344 D st. n. w. Washington, D. C., at 3.30 o'clock p. m. of Thursday, February 24, 1910, for the purpose of

Additional cross-examination of BERNARD A. DUKE.

By Mr. MADDOX:

Q. Mr. Duke, are you acquainted with Mr. Henry Maurice Talbott? A. Yes, sir.

Q. How long have you known him?

Mr. RIDOUT: Question objected to as having been already answered in the previous cross-examination of this witness.

Q. How long have you known him, and where did you first meet him? A. I don't know how long I have known him, nor where I first met him.

299 Q. Have you known him twenty years? A. I have answered that I didn't know how long I have known him.

Q. Have you known him twenty years? A. I have answered your question; I don't know how long I have known him.

Q. Have you known him since you first met him? A. I may have.

Q. Did you ever have any business with him? A. Yes, sir.

Q. Of what character? A. Placing loans.

Q. For Mr. Talbott? A. Yes, sir.

Q. Investing money for him? A. I don't know whether it was investing money for *him* or not.

Q. Investing money that he entrusted to you? A. I would go and offer him loans, and he would make them; I don't know whose money it was.

Q. It was money that he had control of, then. Were you not one of the defendants in a suit brought against him and others by Frank Wood and by David Grayson in the District in 1899? A. Yes, sir.

Q. Do you know why you were made a defendant in that suit? A. No, sir.

Q. Do not? A. No, sir.

300 Q. Did not a man named Haller convey the land on which the Victoria apartment house was built, together with other land, to you in trust for Wood and Talbott?

Mr. RIDOUT: Objected to as not proper cross-examination.

A. No, sir. Mr. Haller conveyed the property to me for Haller and Wood.

Q. And subsequently Mr. Haller conveyed his interest to Talbott?

Mr. RIDOUT: The same objection.

A. I don't remember about that.

Q. How long after the affirmance of this judgment in the Supreme Court was it that you first went to see Mr. Pickford about it?

Mr. RIDOUT: Question objected to as being an unfair representation of what the witness has testified to; his testimony was that Mr. Pickford through Mr. Walter sought him.

Q. How long after the affirmance of this judgment in the Supreme Court did you first see Mr. Pickford? A. Mr. Walter told me, just about the time the decision was handed down, to go down and see Mr. Pickford.

Q. Just about that time, down to Mr. Pickford's office in the Colorado building? A. Yes, sir.

Q. On what floor was Mr. Pickford's office in the Colorado building then? A. On the sixth floor I think it was.

Q. Your negotiations with Mr. Pickford were prior to
301 the date of the $8500 check you speak of, were they not? A. Yes, sir.

Q. When you saw Mr. Pickford did you not tell him that Mr. Talbott had sent you to say that the judgment would be settled for $500 off, and that Mr. Talbott would pay you $100 for settling it? A. No, sir; I don't remember any such conversation.

Q. About the Electric Express Co., who owned the property near Baltimore? A. Mr. Carleton B. Hazzard claimed to be the owner of it.

Q. And you and Mr. Ubhoff were trying to negotiate a deal about that with Mr. McCormick? A. No, sir; we made the deal with Mr. McCormick.

Q. And was Mr. McCormick going to buy the mortgage? A. He was to trade bonds for the property.

Q. You were trying to help him along with this deal, were you not—trying to negotiate this deal for him? A. For whom?

Q. For Mr. McCormick A. No. I represented Mr. Hazzard in making a trade for these bonds.

Q. Mr. Pickford had a mortgage on the property? A. So Mr. Hazzard said.

Q. Did you not see Mr. Pickford in regard to extending the mortgage? Did you not go to see him for that purpose? A. No, sir; I did not go to see him for that purpose. Mr. Pickford sent for me,

saying that he held a mortgage on the property; that Mr. McCormick wanted an extension on the loan.

302 Q. Well, is that all? A. What else do you want to know? I am trying to answer as far as I can.

Q. Who wanted an extension? A. I don't know who wanted an extension; I guess it was Mr. McCormick.

Q. Did Mr. Pickford say anything to you about extending? Did he consent to the extension? A. I don't remember whether he did or not.

Q. Has it actually been extended? A. I know nothing about that.

Q. Did not Mr. Pickford tell you he would consent to the extension provided your friend Talbott dismissed this judgment against him, or words to that effect? A. He may have.

Q. And then did you not see if you could arrange with Mr. Talbott to have the judgment settled on some such basis as that? A. I tried to see if Mr. Talbott would take $12,000 worth of Electric Express Company's bonds and cancel that judgment.

Q. I show you certified check of Thomas H. Pickford, dated January 4, 1909, drawn to his own order, for $8500, on the United States Trust Co. Is that the check you say you saw in relation to this transaction? A. I guess it is. It has been some time ago.

Q. Then I suppose you were mistaken in saying it was drawn on the Commercial National Bank? A. When I answered your question I said it was on the Commercial National or the U. S. Trust Co.

303 Mr. MADDOX: This is the check called for by Mr. Ridout at the last session, and, as it shows, is a check dated January 4, 1909, on the United States Trust Co., to the order of T. H. Pickford for $8500, signed by him, endorsed by him, and marked "Paid January 9, 1909."

Redirect examination.

By Mr. RIDOUT:

Q. What did Mr. Talbott say when you offered him that $12,000 worth of bonds on behalf of Mr. Pickford? A. He said he wanted the money, would not take any bonds, and I have tried to get him to take the bonds even to this late date.

Q. Do you know how much the issue of those bonds is? A. No, sir; I do not.

Q. As nearly as you can recollect, when was this conversation you had with Mr. Talbott about the bonds? A. Along about the middle of January.

Q. What year? A. This year.

BERNARD A. DUKE.

304 *Opinion.*

Filed March 15, 1910.

* * * * * * *

In granting an injunction pendente lite in this case, I filed a written opinion, with a statement of the case as it then appeared from

the pleadings and affidavits, and in which I suggested to counsel, as a speedy and satisfactory method of trial of the new issue raised by the bill, that issues be framed and sent to a jury. No application appears to have been made to the court by the counsel of either party to obtain such issues, or to follow such suggestion, and I therefore assume that both parties concluded to submit the issue to this court, in preference to the method of trial suggested. On that conclusion being reached by counsel, depositions were taken, and the cause set down for final hearing. This court is therefore called upon to pronounce judgment upon the merits of the controversy raised by the original and amended bill, and the answer thereto.

This issue is in effect an issue as to the truth of the statements made in the libelous article on which the suit at law was brought. The truth of the statements contained in that libelous article could not be proven before the jury in the suit at law, because there was no plea warranting such proof; and there was no such plea filed because counsel were not sufficiently informed of the facts to warrant them in defending on that ground. The defense made was a futile one, because the article itself was libelous, and the defendants in that suit were connected with it in such a manner as to make them re-
305 sponsible for its publication and circulation; and in the absence of evidence which might be submitted to a jury to show that they had just grounds in fact for the severe criticism made of the defendant Talbott, there was no other result to be expected than a verdict for the plaintiff.

The testimony accidentally discovered after the said judgment had been affirmed by the Supreme Court of the United States, places an entirely different face upon the case. If that testimony had been before the jury with the same strength that it has been presented now, added to the testimony already in the case, it would, in my judgment, have changed the result of that verdict, and produced a verdict for the defendants.

Judge Henderson states in his testimony, page (99), that Mr. Talbott stated to him that he, (Talbott,) was especially interested in convicting the defendants, because he believed that the insurance companies, who had paid the insurance money after the fire, had been defrauded. That he represented these insurance companies, and that if the defendants were convicted, it was probable the companies would recover the money that they had paid after the fire, and that a large fee was involved in the matter, which, he understood Mr. Talbott to say, would amount to about $11,000, in the event of success in the recovery.

On the next page, said witness says that Mr. Talbott, according to his recollection, used the plural "we" in speaking of representing the said insurance companies, but did not say who constituted the "we."

306 Mr. Talbott denies mailing these statements to Judge Henderson, but from the manner of his denial, and his explanation of the nearest approach to any such statements, as contained in his answer to the bill, I am led to believe that Judge Henderson's testimony is true.

I must conclude also that if any such statements were made by

Mr. Talbott, it shows a strong probability that he was using his public office in an improper manner, in indicting the complainants herein, and in retaining that indictment upon the docket; and that the severe criticism in the libelous article had foundation in fact to justify its publication, or at least to excuse those responsible for its publication, from responding in damages therefor.

Counsel for the complainants could not reasonably have anticipated the finding of any such evidence as that of Judge Henderson before or during the trial of the suit at law; and therefore I am not disposed to hold the complainants responsible for negligence in any way in not pleading the truth of the facts stated in the said libel in the said law suit.

In the case of the Marine Insurance Company v. Hodgson, 6 Cranch, 336, Chief Justice Marshall stated the rule to be applied in such case as this as follows:

"Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law, or of which
307 he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself, or his agents, will justify an application to a court of chancery."

This case is quoted and relied upon in Kibbe v. Benson, 17 Wallace, (84 U. S.) 628.

See also

Powers v. Butler, 4 N. J. Equity, 465-471.
Williams v. Lane, 3 Atkyns, 223.
Iglehart v. Lee, 4 Md. Ch., 514.

Believing Judge Henderson's testimony to be true, and that it would be inequitable and against conscience for the judgment plaintiff to recover the amount of the said judgment, under the facts as now shown, I am disposed to hold that a permanent injunction should be issued, enjoining him from collecting the same, and I will sign a decree to that effect.

JOB BARNARD, *Justice.*

Final Decree Granting Perpetual Injunction.

Filed March 21, 1910.

* * * * * * *

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, it is this 21" day of March, 1910, adjudged, ordered and decreed as follows, viz: that the injunction heretofore issued in this cause be, and the same is hereby, made perpetual, and that the defendants, Henry M. Talbott, Aulick Palmer, Andrew A. Lipscomb and Henry F. Woodard,

and each of them, and their and each of their respective attorneys,
agents and assignees, be, and they are hereby, perpetually
308 enjoined and restrained from collecting or enforcing, or attempting to collect or enforce, the judgment against said complainants at the suit of said Henry M. Talbott in cause numbered 45,662 on the law dockets of this Court, mentioned and referred to in the proceedings herein, and from asserting the same or the record thereof as a charge or demand upon the complainants herein, or either of them, or the property of either of them.

It is further adiudged, ordered and decreed that the complainants recover of the defendants, Henry M. Talbott and Andrew A. Lipscomb, the costs of this suit, to be taxed by the Clerk, and have execution thereof as at law.

By the Court:

JOB BARNARD, *Justice.*

From the above decree the defendant, Henry M. Talbott, appeals to the Court of Appeals, and the bond to operate as a supersedeas of so much of the decree as provides for the recovery of costs is hereby fixed at the sum of $500.

JOB BARNARD, *Justice.*

309 *Order of Severance.*

Filed March 24, 1910.

* * * * * * *

It appearing that all the persons affected by the final decree herein except Henry M. Talbott have elected not to appeal therefrom, it is this 24th day of March, 1910, ordered that said Talbott be and he is granted leave to sever from his co-defendants on his appeal from said decree.

THOS. H. ANDERSON, *Justice.*

Directions to Clerk for Preparation of Transcript of Record.

Filed March 28, 1910.

* * * * * * *

In preparing the record on the appeal of Henry Maurice Talbot in this cause, please include the following:

1. Bill.
2. Restraining order.
3. Answer of Henry M. Talbott.
4. Answer of Aulick Palmer.
5. Demurrer of Andrew Lipscomb.
6. Motion to dissolve restraining order, and affidavits in support.
7. Amended Bill.

8. Answer of Henry M. Talbott.
9. Answer of Andrew A. Lipscomb.
10. Disclaimer of Thomas M. Talbott.
11. Opinion and order overruling motion to dissolve.
12. Depositions on both sides.

310 13. Opinion.
14. Final Decree.
15. Appeal.
16. Order of severance.
17. Bond.

JOHN RIDOUT,
Attorney for Defendant Henry M. Talbott.

Memorandum.

March 31, 1910.—Appeal bond filed.

311 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 310, both inclusive, to be a true and correct transcript of the record according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 28244 in Equity, wherein Thomas H. Pickford, et al., are Complainants and Henry M. Talbott, et als., are Defendants, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court at the City of Washington, in said District, this 14th day of April, 1910.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2152. Henry M. Talbott, appellant, vs. Thomas H. Pickford et al. Court of Appeals, District of Columbia. Filed Apr. 15, 1910. Henry W. Hodges, clerk.

No. 2152.

HENRY M. TALBOTT, Appellant,
vs.
THOMAS H. PICKFORD and JOHN H. WALTER.

TUESDAY, *October* 18*th*, A. D. 1910.

The argument in the above entitled cause was commenced by Mr. John Ridout, attorney for the appellant.

No. 2152.

HENRY M. TALBOTT, Appellant,
vs.
THOMAS H. PICKFORD and JOHN H. WALTER.

WEDNESDAY, *October* 19*th*, A. D. 1910.

The argument in the above entitled cause was continued by Mr. John Ridout, attorney for the appellant, and by Mr. Henry E. Davis, attorney for the appellees, and was concluded by Mr. John Ridout, attorney for the appellant.

No. 2152.

HENRY M. TALBOTT, Appellant,
vs.
THOMAS H. PICKFORD and JOHN H. WALTER.

Opinion.

Mr. Chief Justice Shepard delivered the opinion of the Court:

This is an appeal from a decree perpetually enjoining the execution of a judgment recovered in an action of libel in the Supreme Court of the District of Columbia by Henry M. Talbott against Thomas H. Pickford and John H. Walter.

The action was begun September 27, 1902, and ended in a judgment for plaintiff for $8,500 March, 1906. That judgment was affirmed by the Court of Appeals December 14, 1906, and on appeal to the Supreme Court of the United States again affirmed November 30, 1908.

The bill on which this decree was entered was filed January 8, 1909, by Pickford and Walter against Henry M. Talbott, Aulick Palmer, Thomas M. Talbott, Andrew A. Lipscomb, and Henry F. Woodard. Palmer was sued as marshal of the District, and Thomas M. Talbott, Lipscomb, and Woodard as assignees in part of the judgment.

The bill gives a lengthy history of criminal proceedings against plaintiffs in the Circuit Court of Montgomery County, Maryland, for arson, conducted by Talbott, State's attorney, the dismissal of the

same, and the institution of the action at law by Talbott for damages for a libelous publication relating to Talbott's action in procuring the indictment of the plaintiffs.

The bill further alleges that the gravamen of the said action was that in the publication complained of, Pickford and Walter had charged defendant Henry M. Talbott with an abuse of his official position and prostitution of his said office for the purpose and in the hope, through the criminal proceedings, of obtaining from the insurance companies large sums of money, and in effect using his said office for his personal end and gain. That at the time of the filing of said declaration the complainants believed it to be true that the defendant Talbott had in fact caused the said indictment for the purpose aforesaid, and so informed their counsel before filing pleas to said declaration, but complainants were advised by their counsel, that should they attempt by their said pleas to justify the publication of the said article by pleading the truth thereof, and fail to make good such plea by evidence to the court and jury, the said attempt at justification would be held to be a repetition and republication of the said libel, and would aggravate the damages possibly to be recovered in said cause. They were also advised that if they should plead not guilty, they would in all probability be excluded from endeavoring to prove the truth of the said article; and the complainants, principally because of the secret nature of the supposed and believed conduct of the said Talbott in the premises, being unable after due diligence to submit and procure for their counsel evidence which in the opinion of the counsel might properly and safely be offered before the court on the trial of the said cause at law, in justification of the said article and libel and in proof of the truth thereof, were compelled to confine their defense in the said cause to the general issue, and were thereby deprived of the right to offer evidence tending to prove the truth aforesaid; and although their counsel did in fact offer, on the said trial, evidence tending to impugn the good faith of said defendant in procuring the indictment aforesaid, the justice trying the said cause declared that such offer was an attempt on the part of said complainants and their counsel to prove the truth of the said article without having pleaded the same. Wherefore, the said offer of the said testimony was rejected by the court.

The complainants were permitted to introduce the same not in justification of the said libel, or to prove the truth thereof, but to indicate the absence of malice and to mitigate the damages.

This was followed by a lengthy statement of matters offered in evidence at the trial of said action, tending to show a conspiracy between one Hopp and one Hudson, coöperated in by Talbott, to extort money from Pickford. It was then further alleged that before pleading to said declaration the plaintiff (defendants thereto) and their counsel diligently inquired of every person believed or suspected to have any possible knowledge in the premises, with a view of obtaining evidence to support a plea of justification, and to prove the truth of the alleged libelous matters. Said inquiries were wholly in vain until, on December 29, 1908, one of their counsel, in an

accidental meeting and conversation with one of the judges of the said Circuit Court of Maryland, ascertained from him the following facts:

Between the finding of the indictment and the time the same was nolle prossed, the said judge had a conversation with Talbott, and asked him why he kept the said case open on the docket, in view of the decision of Mr. Justice Bradley, in the soundness of which opinion and decision, he expressed his concurrence; whereupon the said Talbott told the judge that he was keeping the case open, because he had a large fee, to wit, $11,000 involved, and which he, the said defendant, expected to get, through a civil aspect of the case, in which some insurance companies were interested; and in the same conversation the defendant, in effect stated, or caused the said judge to understand and believe, that the defendant was keeping the case open in order to get out of the complainants a large sum of money for his, Talbott's, personal gain and advantage.

It was further alleged that prior to said date neither parties nor counsel had any knowledge or suspicion of said conversation, nor could they by the exercise of any diligence have learned of the same through said Talbott, or the said judge; and it did not occur to them or their counsel that said Talbott could or would have made such statements to any one. On the day the bill was filed a restraining order was served upon the defendants. Henry M. Talbott answered the bill specifically denying the allegations thereof relating to his misconduct and to his statements to Judge Henderson. He further said, that in discussing the indictments, either he or Judge Henderson expressed the opinion that the insurance companies could recover what they had paid plaintiffs.

The answers of the other defendants are unimportant. The testimony offered by the plaintiffs took a wider range presenting matters in evidence in the trial of the action at law. This is omitted as immaterial, as also certain other evidence relating to conduct and declarations of Lipscomb, who had been of counsel of Talbott, in the action at law, after the judgment had been affirmed by the Supreme Court of the United States, and who had become estranged from his former client. This is omitted as it seems wholly irrelevant, as well as otherwise inadmissible.

The material testimony in support of the bill was that of Judge Henderson, which is substantially as follows: He had known Talbott for twenty years. Talbott entered upon the duties of State's Attorney in January, 1900, remaining four years. Remembered the indictment of Pickford and others, for a fire occurring in 1897. After the indictment, had a conversation with Talbott, stated as follows: After the disposition of the habeas corpus case in the District of Columbia, Talbott came to see me several times and asked me to suggest some means by which the defendants, other than Pickford, could be brought within the jurisdiction of the court. I told him I could make no suggestions, that the only recourse would be to secure a requisition and that had been tried, and the defendants had been released under a habeas corpus proceeding. I had examined somewhat the question that had been decided, namely, the validity

of the indictment, as to whether or not it charged any offense under the law of Maryland, and reached the same conclusion that Justice Bradley had. Mr. Talbott dissented from this interpretation of the law and contended that it was sufficient to charge the offense in the words of the indictment and then any evidence of corrupt motive could be adduced in support of the indictment at the trial. He stated that he was especially interested in the conviction of these defendants, because he believed that the insurance companies had been defrauded; that he represented the insurance companies, and that if the defendants were convicted, it was probable the companies could recover the money they had paid after the fire, that a large fee was involved in the matter. I understood him to say that the fee would amount to about $11,000. He stated that he wished, at least, to retain the case on the docket, because he had every reason to believe that if Shaw, one of the defendants, was brought within the jurisdiction of the court, he would confess and turn State's evidence. He said "we" would receive a fee, but did not say who constituted the "we." My recollection is at the November term of court Talbott wished to secure further time. I think the court announced that he would have to try the case or enter a nolle. He then nolled the case as far as Pickford was concerned. The same action was taken with reference to Walter, and has been recently taken with reference to Bradshaw. The indictment now stands against Shaw. I may have mentioned the matter to one or two members of the bar, and if I did, told them to say nothing about it. I mentioned the matter to Mr. Henry E. Davis, counsel for the defendant Pickford, on the evening of Christmas day, 1908. I had been informed that the Supreme Court of the United States had sustained the judgment of the Court of Appeals, and I supposed at that time the litigation was at an end, or I should have never mentioned the matter to Mr. Davis. I do not remember any consultation with Talbott with respect to the form of the indictment before it was found. I am positive that I never stated that the indictment would be good under section 7, article 27, of the Code. Witness recalled that Talbott had shown him a paper purporting to be a confession of Hudson, but thinks it was after the indictment. After reading that paper witness did not exercise his judicial authority to prevent the proceeding under the indictment. After the indictment had been found, I had nothing to do, either with the further prosecution of it, or the requisition. I have no recollection of the members of the grand jury conferring with me about the indictment, but if my advice had been requested, I would have advised them that they could not find an indictment on the evidence of Hudson alone. Was sure that he was never consulted by Talbott as to the form of the indictment, or the sufficiency of the evidence before the indictment. No inquiry was ever made by any one purporting to be counsel for Pickford or Walter prior to Christmas eve, 1908, concerning my knowledge of the attendant circumstances on the indictment of Pickford and Walter. I was at the B. & O. R. R. station at Rockville. Had just gone out for a walk and gotten as far as the railroad station, when I met Mr. Davis. During the course of the conversation, I asked him whether

the judgment of Talbott against Pickford had been paid. He said no; that some question had arisen about the division of the judgment, and it had been held up until that question could be settled. Had been impressed by the fact that Talbott had, in his suit against Pickford, recovered a sum which was substantially equivalent to what his fee might have been had he recovered the claims for the insurance companies, and I thought he had been particularly fortunate, and that impression had been made on my mind when I heard the result of the case, and I suppose it continued there. I have not said that the statement conveyed any idea of impropriety to my mind. Maintained silence, but may have mentioned it to one or two members of the bar, with the injunction of secrecy. My motive was, because I was judge of the court before which Mr. Talbott was a member, and was brought into frequent contact with him, and I did not want to do anything that would incur his enmity. I did not feel that I was called upon to do it. I have a very definite recollection of the conversation with Talbott. I could not have imagined that. From the time of that conversation down to December, 1908, I have made no allusion to the conversation, with the possible exception of one or two members of the bar of Rockville; and took no action respecting the information obtained from that conversation. Pickford alone could only have been tried at the term of the court at which he appeared, because the others had not been arrested. If there is any good reason why the parties should be tried together the practice is to wait a reasonable time to secure the arrest of the other defendants. In this case it had been made manifest, that the attendance of the other defendants could not be secured, and the court was of the opinion that there was nothing in the indictment and therefore, it is very likely, insisted that so far as Pickford is concerned, the case should be disposed of. Where the testimony concerning one defendant would have been identical with that concerning all, there would have been good reason for waiting a reasonable time for the arrest of the other parties, if the court had been satisfied that there was any substantial offence charged in the indictment.

On his own behalf, Henry M. Talbott testified that he had heard the testimony of Judge Henderson and had since read the record of it. That he never made at any time or place the statements attributed to him in that testimony. He knows Andrew A. Lipscomb, but never had any arrangement or agreement with him directly or indirectly with respect to the collection of money for the benefit of the insurance companies, or any one of them. Never had any agreement, express or implied, with the insurance companies, or any one of them, for any fee, or for any action to be taken by me, either officially or individually in the interest of those companies, or for any purpose whatever. Never had any arrangement before or after the indictment of Pickford, Walter, Shaw, and Bradshaw, with James Hudson having for its object the use of the prosecution of these men in the interest of the insurance company.

Some other testimony offered by the defendants is omitted as

immaterial, having apparently been offered in rebuttal of some of the evidence of plaintiffs, before referred to as irrelevant.

Henry M. Talbott alone electing to appeal was granted a severance from his codefendants for that purpose.

Modern legislation, generally, authorizes the setting aside of judgments at law, after term, and the granting of new trials for good cause shown in petitions therefor addressed to the court rendering the judgment complained of. These remedies, by reason of their justice and efficacy, have largely superseded the practice of resorting to equity to obtain injunctions against the executions of such judgments. Their consequences are not so serious as those resulting from perpetual injunctions against executions, which forever conclude the plaintiffs in the judgments enjoined; for the extent of the relief obtained through the statutory remedies is to reopen the case for another trial of the issues by a jury in the same court. The plaintiff in judgment is afforded a chance to try the truth and weight of the newly discovered evidence, if that be the ground of relief, or to retry the case on its merits, if by accident of fraud, the opposing party may have been deprived of a fair trial, in the first instance.

There is no statute governing the proceedings in this jurisdiction in such cases, and the equity jurisdiction remains unaffected. It is well settled that it is within that jurisdiction to restrain a party from availing himself of a judgment obtained at law, if it be made clearly to appear that there are facts, which prove it to be against conscience, which facts the complaining party was prevented from availing himself of on the trial at law by fraud or accident, unmixed with any fault or negligence of himself or his counsel or agents. Marine Ins. Co. v. Hodgson, 7 Cr. 332-336; Hendrickson v. Hinckley, 17 Howard 443-445; Crim v. Handley, 94 U. S., 652-659; U. S. v. Throckmorton, 98 U. S., 61-65.

The importance and value of the settled maxims of public policy, that there shall be an end of litigation, or that repeated litigation between the same parties in regard to the same subject of controversy shall be prevented, make it an imperative condition of such relief that the party seeking it shall make it clearly appear that he had a good defense to the action, which, by fraud or accident he was prevented from making, and also that there was neither fault nor negligence on his part. In the language of the Court of Appeals of New York: "The conditions under which such claims can be supported require at least the proof of extraordinary circumstances, the absence of laches, and the establishment of a case showing no reasonable doubt as to the conclusiveness of the discovered proof, the justice of the claim, and the merits of the controversy." Mayor, etc. v. Brady, 115 N. Y., 599-607.

Assuming, for the moment, that the newly discovered evidence elicited from the witness Henderson would be sufficient ground for restraining execution of the judgment, as decreed in this case, it was incumbent upon the plaintiffs to prove as well as allege, that the failure to discover evidence of the truth of the libelous charges, and plead the same by way of defense, was not through their own fault or failure of diligence. In our opinion they have not dis-

charged this obligation. The publication assailed the fairness and integrity of the State's attorney, accussing him of using his position for the purpose of oppression and extortion, and was grossly libelous. Plaintiffs as defendants in that action, denied that the publication was made by them, or their authority or instigation. They did not plead the truth of the charges. In the trial they attempted to show the truth of the charges on the cross-examination of the plaintiff in the case. The evidence was rejected, and rightly so, because there was no plea to warrant its introduction. Pickford v. Talbott, 28 App. D. C., 498-505; 35 S. C., 211 U. S., 199-208.

The bill for injunction alleges as the reason for the failure so to plead, that the parties had made diligent efforts to discover evidence to support such a defense, which proved futile, and had, in consequence, been advised by their counsel that to plead justification without some proof in support of the plea would possibly prejudice their case through a probable aggravation of the damages. This was a fact in issue, and constitutes an essential foundation for the relief sought. A careful examination of the record discloses no evidence whatever in support of the allegation. One of the plaintiffs, Walter, was not offered as a witness at all, even to contradict the evidence of the witness Hudson (one of the parties charged with the conspiracy to extort money from him and Pickford through the prosecution in Maryland) to the effect that Walter had offered him $500 for an affidavit of facts in support of the bill. Neither Pickford nor his leading counsel in the action for libel who were witnesses testified to a single fact tending to show that there had been any effort to discover evidence of the truth of the charges or any advice not to plead justification because of the failure to discover evidence to support it.

This opinion might well have ended here, but the importance of the case and the questions involved warrant the discussion of other points.

Assuming, now, that the facts elicited from the lately discovered witness could not reasonably have been discovered before, that there was no lack of diligence in searching for like evidence, and that there was no fault or mistake in omitting to plead, we pass to the question: Is that evidence so certain and conclusive that it would, without reasonable doubt, have determined the action for libel in defendant's favor, could it then have been made available?

It must be borne in mind that the burden of proof of such facts would be upon the party pleading them. The witness, Judge Henderson testified to a conversation had with Talbott about nine years before, of which he had no memorandum to refresh his memory. The difficulty of being able to report accurately an oral statement made to one, especially after a lapse of years, is too well-known to require comment. Moreover, the testimony of the witness shows that he could not be equally certain in respect of some other conversations relating to the prosecution, then depending in his court. Talbott as a witness on his own behalf expressly denied making the statements attributed to him, but testified to having discussed certain questions of law relating to the form of the indictment, and the

extradition proceedings thereon. He also expressly denied any arrangement made, or contemplated with any one, by which he was, or expected to receive any pecuniary benefit from the prosecution of the several indicted persons. Considering the ordinary laws that govern human conduct, it would, under ordinary conditions, seem improbable that a lawyer of any capacity, holding the important office of State's attorney would, without apparent motive, deliberately make a statement to anyone, much less the judge of his circuit, that he was using the powers and opportunities of his office for private gain. The plaintiffs, appreciating this, allege it as one of the reasons why they made no inquiries to ascertain if such was the case. Again, the impression which the witness now has of the conversation would seem, in a measure at least, not to have been so strong at the time. It does not appear that he rebuked the attorney, or warned him that the case must be promptly tried or dismissed. No notice was given to the members of the bar, that the conduct of the attorney might be investigated; the reason being that he did not care to do anything that might incur his enmity. When the indictment was called for trial, the request of postponement by Talbott was not denied, but offered to be granted upon condition that if not ready on the postponed date, the defendants should have a verdict of not guilty. Knowing of the pending action for the libel no information was given of this important fact, in the interest of justice.

We are not undertaking to say that the testimony is not to be believed, but to call attention to the circumstances that a jury would have been called upon to consider, had it been submitted to them with the burden of proof explained.

In the light of all the circumstances mentioned, we can not concur with the learned justice below in the conviction that had this testimony all been before the jury, a different verdict would necessarily have been the result. It might have been so; but the possibility, or probability even, that a jury might have been influenced thereto, is not sufficient to warrant a decree forever enjoining the execution of a judgment regularly obtained in a court of law. There ought to be no reasonable doubt as to the result.

We have considered this case upon the assumption of the undoubted jurisdiction of equity to restrain the enforcement of a judgment at law, but we are not unmindful of the fact that it is not a perfectly settled question that the jurisdiction is not forbidden by the Seventh Amendment, which declares that: "No fact tried by a jury shall be otherwise examined in any court of the United States, than according to the rules of the common law." The point was made in the Supreme Court of the United States in the case of the Fidelity Mut. Life Ins. Co. v. Clark (203 U. S., 64-73), but was not found necessary to be decided; nor it is here.

For the reasons assigned, the decree will be reversed with costs and the cause remanded to the Equity Court with direction to dismiss the bill.

Reversed.

No. 2152, January Term, 1911.

HENRY M. TALBOTT, Appellant,
vs.
THOMAS H. PICKFORD and JOHN H. WALTER.

Appeal from the Supreme Court of the District of Columbia.

MONDAY, *February 6th*, A. D. 1911.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be and the same is hereby reversed with costs; and that this cause be and the same is hereby remanded to the Equity Court with direction to dismiss the bill.

Per MR. CHIEF JUSTICE SHEPARD.

February 6, 1911.

No. 2152.

HENRY M. TALBOTT, Appellant,
vs.
THOMAS H. PICKFORD and JOHN H. WALTER.

WEDNESDAY, *February 8th*, A. D. 1911.

On motion of Mr. Henry E. Davis, of counsel for the appellees in the above entitled cause, It is ordered by the Court that said appellees be allowed an appeal to the Supreme Court of the United States and the bond to act as supersedeas is fixed at the sum of fifteen thousand dollars.

(*Bond on Appeal.*)

Know all Men by these Presents, That we, Thomas H. Pickford and John H. Walter, as principals, and John Taylor Armes, as surety, are held and firmly bound unto Henry M. Talbott in the full and just sum of Fifteen thousand ($15,000) dollars, to be paid to the said Henry M. Talbott, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 10th day of February, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said Court, between Henry M. Talbott, Appellant and Thomas H. Pickford and John H. Walter, appellees a decree was rendered against the said Thomas H. Pickford and John H. Walter and the said Thomas H. Pickford and John H. Walter having prayed and obtained an appeal to the Supreme Court

of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Henry M. Talbott citing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, That if the said Thomas H. Pickford and John H. Walter shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

THOMAS H. PICKFORD. [SEAL.]
JOHN H. WALTER. [SEAL.]
JOHN TAYLOR ARMES. [SEAL.]

Sealed and delivered in presence of—

——— ———.
——— ———.
——— ———.

Approved by—

SETH SHEPARD,
Chief Justice, Court of Appeals
of the District of Columbia.

Surety satisfactory.

JOHN RIDOUT,
For Talbott.

[Endorsed:] No. 2152. Henry M. Talbott, appellant, vs. Thomas H. Pickford and John H. Walter. Supersedeas Bond on appeal to Supreme Court U. S. Court of Appeals, District of Columbia. Filed Feb. 9, 1911. Henry W. Hodges, clerk.

UNITED STATES OF AMERICA, *ss:*

To Henry M. Talbott, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein Thomas H. Pickford and John H. Walter, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 10th day of February, in the year of our Lord one thousand nine hundred and eleven.

SETH SHEPARD,
Chief Justice of the Court of Appeals
of the District of Columbia.

Service accepted this 11 day of February A. D. 1911.

JNO. RIDOUT.
For Appellee.

[Endorsed:] Court of Appeals, District of Columbia. Filed Feb. 11, 1911. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 167 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Henry M. Talbott, Appellant, vs. Thomas H. Pickford and John H. Walter, No. 2152, January Term, 1911, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 16th day of February A. D. 1911.

[Seal Court of Appeals, District of Columbia.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,531. District of Columbia Court of Appeals. Term No. 910. Thomas H. Pickford and John H. Walter, appellants, vs. Henry M. Talbott. Filed February 17th, 1911. File No. 22,531.

20

Office Supreme Court, U. S.
FILED.
APR 22 1911
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 512

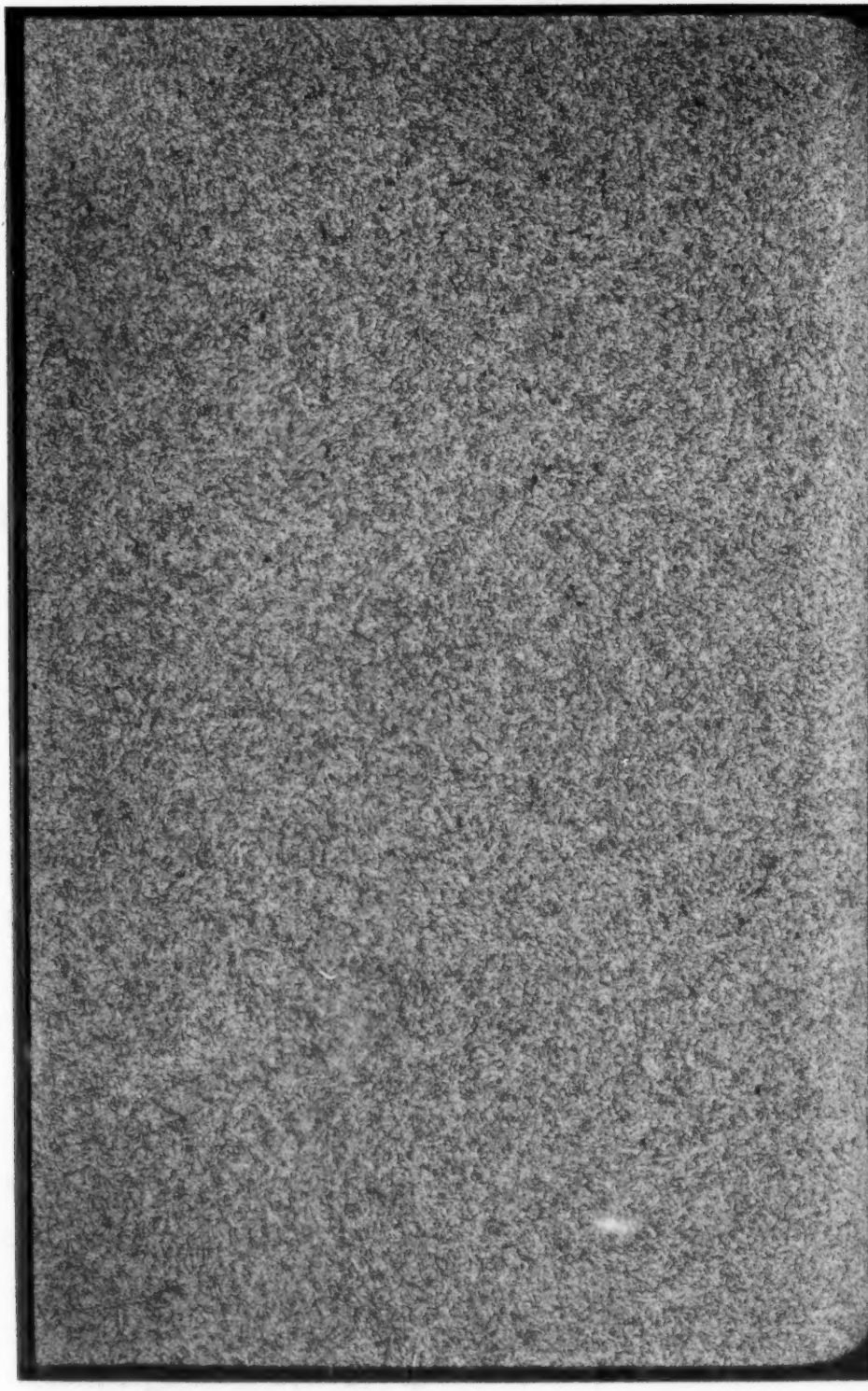
THOMAS H. PICKFORD AND JOHN H. WALTER,
APPELLANTS,

vs.

HENRY M. TALBOTT.

MOTION TO ADVANCE.

JOHN RIDOUT,
Attorney for Appellee.



IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 910.

THOMAS H. PICKFORD AND JOHN H. WALTER,
APPELLANTS,

vs.

HENRY M. TALBOTT.

MOTION TO ADVANCE.

Now comes the appellee, by John Ridout, his attorney, and moves the court to advance this cause for hearing on the grounds:

1. That within the spirit of rule 26, clause 4, this cause has been once adjudicated in this court upon the merits.

2. That the special and peculiar circumstances of this cause justify its advancement under clause 7 of said rule.

Statement.

The original action upon which this cause is based was begun September 27, 1902.

Judgment was rendered in March, 1906.

That judgment was affirmed by the Court of Appeals of the District of Columbia December 14, 1906.

28 Appeals D. C., 498.

It was affirmed in this court November 30, 1908.

211 U. S., 199.

The bill in this cause was filed January 8, 1909, on which a temporary restraining order was granted, and afterwards a decree was passed perpetually enjoining the collection of the judgment in the action at law.

On February 6, 1911, the Court of Appeals reversed the last-mentioned decree and remanded the cause, with directions to dismiss the bill, and the cause is now here on appeal from that decree.

From the foregoing it will appear that the original controversy commenced in 1902 and passed into judgment in 1906.

It has been before the Court of Appeals of the District of Columbia twice and in essence is in this court for the second time.

The great hardship of the situation as to the appellee is apparent.

It is submitted that upon the record this cause is within the provision of both clauses 4 and 7 of rule 26.

By way of explanation and as part of this statement, the opinion of the Court of Appeals of the District of Columbia,

which forms part of the record in this cause, is herewith submitted as an appendix.

Respectfully submitted,

JOHN RIDOUT,
Attorney for Appellee.

Messrs. SAMUEL MADDOX, H. PRESCOTT GATLEY, and HENRY E. DAVIS, *Attorneys for Appellants:*

Please take notice that the foregoing motion to advance and statement in support thereof will be submitted to the court on Monday, May 15, 1911, at the opening of the court on that day, or as soon thereafter as counsel can be heard.

JOHN RIDOUT,
Attorney for Appellee.

Service acknowledged this — day of April, 1911.

APPENDIX.

Mr. Chief Justice SHEPARD delivered the opinion of the court:

This is an appeal from a decree perpetually enjoining the execution of a judgment recovered in an action of libel in the Supreme Court of the District of Columbia by Henry M. Talbott against Thomas H. Pickford and John H. Walter.

The action was begun September 27, 1902, and ended in a judgment for plaintiff for $8,500 March, 1906. That judgment was affirmed by the Court of Appeals December 14, 1906, and on appeal to the Supreme Court of the United States again affirmed November 30, 1908.

The bill on which this decree was entered was filed January 8, 1909, by Pickford and Walter against Henry M. Talbott, Aulick Palmer, Thomas M. Talbott, Andrew A. Lipscomb, and Henry F. Woodard. Palmer was sued as marshal of the District, and Thomas M. Talbott, Lipscomb, and Woodard as assignees in part of the judgment.

The bill gives a lengthy history of criminal proceedings against plaintiffs in the Circuit Court of Montgomery County, Maryland, for arson, conducted by Talbott, State's attorney, the dismissal of the same, and the institution of the action at law by Talbott for damages for a libelous publication relating to Talbott's action in procuring the indictment of the plaintiffs.

The bill further alleges that the gravamen of the said action was that in the publication complained of, Pickford and Walter had charged defendant Henry M. Talbott with an abuse of his official position and prostitution of his said office for the purpose and in the hope, through the criminal proceedings, of obtaining from the insurance companies large sums of money, and in effect using his said office for his personal end and gain. That at the time of the filing of said declaration the complainants believed it to be true that the defendant Talbott had in fact caused the said indictment for the purpose aforesaid, and so informed their counsel before filing pleas to said declaration, but com-

plainants were advised by their counsel, that should they attempt by their said pleas to justify the publication of the said article by pleading the truth thereof, and fail to make good such plea by evidence to the court and jury, the said attempt at justification would be held to be a repetition and republication of the said libel, and would aggravate the damages possibly to be recovered in said cause. They were also advised that if they should plead not guilty, they would in all probability be excluded from endeavoring to prove the truth of the said article; and the complainants, principally because of the secret nature of the supposed and believed conduct of the said Talbott in the premises, being unable after due diligence to submit and procure for their counsel evidence which in the opinion of the counsel might properly and safely be offered before the court on the trial of the said cause at law, in justification of the said article and libel and in proof of the truth thereof, were compelled to confine their defense in the said cause to the general issue, and were thereby deprived of the right to offer evidence tending to prove the truth aforesaid; and although their counsel did in fact offer, on the said trial, evidence tending to impugn the good faith of said defendant in procuring the indictment aforesaid, the justice trying the said cause declared that such offer was an attempt on the part of said complainants and their counsel to prove the truth of the said article without having pleaded the same. Wherefore, the said offer of the said testimony was rejected by the court.

The complainants were permitted to introduce the same not in justification of the said libel, or to prove the truth thereof, but to indicate the absence of malice and to mitigate the damages.

This was followed by a lengthy statement of matters offered in evidence at the trial of said action, tending to show a conspiracy between one Hopp and one Hudson, co-operated in by Talbott, to extort money from Pickford. It was then further alleged that before pleading to said declaration the plaintiff (defendants thereto) and their counsel diligently inquired of every person believed or suspected to have any possible knowledge in the premises, with a view of obtaining evidence to support a plea of justification, and to prove the truth of the alleged libelous matters. Said inquiries were wholly in vain until, on December 29, 1908, one of their counsel, in an accidental meeting and conversation with one

of the judges of the said Circuit Court of Maryland, ascertained from him the following facts:

Between the finding of the indictment and the time the same was *nolle prossed*, the said judge had a conversation with Talbott, and asked him why he kept the said case open on the docket, in view of the decision of Mr. Justice Bradley, in the soundness of which opinion and decision, he expressed his concurrence; whereupon the said Talbott told the judge that he was keeping the case open, because he had a large fee, to wit, $11,000, involved, and which he, the said defendant, expected to get, through a civil aspect of the case, in which some insurance companies were interested; and in the same conversation the defendant, in effect stated, or caused the said judge to understand and believe, that the defendant was keeping the case open in order to get out of the complainants a large sum of money for his, Talbott's, personal gain and advantage.

It was further alleged that prior to said date neither parties nor counsel had any knowledge or suspicion of said conversation, nor could they by the exercise of any diligence have learned of the same through said Talbott, or the said judge; and it did not occur to them or their counsel that said Talbott could or would have made such statements to any one. On the day the bill was filed a restraining order was served upon the defendants. Henry M. Talbott answered the bill specifically denying the allegations thereof relating to his misconduct and to his statements to Judge Henderson. He further said, that in discussing the indictments, either he or Judge Henderson expressed the opinion that the insurance companies could recover what they had paid plaintiffs.

The answers of the other defendants are unimportant. The testimony offered by the plaintiffs took a wider range, presenting matters in evidence in the trial of the action at law. This is omitted as immaterial, as also certain other evidence relating to conduct and declarations of Lipscomb, who had been of counsel of Talbott, in the action at law, after the judgment had been affirmed by the Supreme Court of the United States, and who had become estranged from his former client. This is omitted as it seems wholly irrelevant, as well as otherwise inadmissible.

The material testimony in support of the bill was that of Judge Henderson, which is substantially as follows: He had known Talbott for twenty years. Talbott entered upon the

duties of State's attorney in January, 1909, remaining four years. Remembered the indictment of Pickford and others, for a fire occurring in 1897. After the indictment had a conversation with Talbott, stated as follows: After the disposition of the *habeas corpus* case in the District of Columbia, Talbott came to see me several times and asked me to suggest some means by which the defendants, other than Pickford, could be brought within the jurisdiction of the court. I told him I could make no suggestions, that the only recourse would be to secure a requisition and that had been tried, and the defendants had been released under a *habeas corpus* proceeding. I had examined somewhat the question that had been decided, namely the validity of the indictment, as to whether or not it charged any offense under the law of Maryland, and reached the same conclusion that Justice Bradley had. Mr. Talbott dissented from this interpretation of the law and contended that it was sufficient to charge the offense in the words of the indictment and then any evidence of corrupt motive could be adduced in support of the indictment at the trial. He stated that he was especially interested in the conviction of these defendants, because he believed that the insurance companies had been defrauded; that he represented the insurance companies, and that if the defendants were convicted, it was probable the companies could recover the money they had paid after the fire, that a large fee was involved in the matter. I understood him to say that the fee would amount to about $11,000. He stated that he wished, at least, to retain the case on the docket, because he had every reason to believe that if Shaw, one of the defendants, was brought within the jurisdiction of the court, he would confess and turn State's evidence. He said "we" would receive a fee, but did not say who constituted the "we." My recollection is at the November term of court Talbott wished to secure further time. I think the court announced that he would have to try the case or enter a *nolle*. He then *nolled* the case as far as Pickford was concerned. The same action was taken with reference to Walter, and has been recently taken with reference to Bradshaw. The indictment now stands against Shaw. I may have mentioned the matter to one or two members of the bar, and if I did, told them to say nothing about it. I mentioned the matter to Mr. Henry E. Davis, counsel for the defendant Pickford, on the evening of Christmas Day, 1908. I had

been informed that the Supreme Court of the United States had sustained the judgment of the Court of Appeals, and I supposed at that time the litigation was at an end, or I should have never mentioned the matter to Mr. Davis. I do not remember any consultation with Talbott with respect to the form of the indictment before it was found. I am positive that I never stated that the indictment would be good under section 7, article 27, of the Code. Witness recalled that Talbott had shown him a paper purporting to be a confession of Hudson, but thinks it was after the indictment. After reading that paper witness did not exercise his judicial authority to prevent the proceeding under the indictment. After the indictment had been found, I had nothing to do, either with the further prosecution of it, or the requisition. I have no recollection of the members of the grand jury conferring with me about the indictment, but if my advice had been requested, I would have advised them that they could not find an indictment on the evidence of Hudson alone. Was sure that he was never consulted by Talbott as to the form of the indictment, or the sufficiency of the evidence before the indictment. No inquiry was ever made by any one purporting to be counsel for Pickford or Walter prior to Christmas eve, 1908, concerning my knowledge of the attendant circumstances on the indictment of Pickford and Walter. I was at the B. & O. R. R. station at Rockville. Had just gone out for a walk and gotten as far as the railroad station, when I met Mr. Davis. During the course of the conversation, I asked him whether the judgment of Talbott against Pickford had been paid. He said no; that some question had arisen about the division of the judgment, and it had been held up until that question could be settled. Had been impressed by the fact that Talbott had, in his suit against Pickford, recovered a sum which was substantially equivalent to what his fee might have been had he recovered the claims for the insurance companies, and I thought he had been particularly fortunate, and that impression had been made on my mind when I heard the result of the case, and I suppose it continued there. I have not said that the statement conveyed any idea of impropriety to my mind. Maintained silence, but may have mentioned it to one or two members of the bar, with the injunction of secrecy. My motive was, because I was judge of the court before which Mr. Talbott was a mem-

ber, and was brought into frequent contact with him, and I did not want to do anything that would incur his enmity. I did not feel that I was called upon to do it. I have a very definite recollection of the conversation with Talbott. I could not have imagined that. From the time of that conversation down to December, 1908, I have made no allusion to the conversation, with the possible exception of one or two members of the bar of Rockville; and took no action respecting the information obtained from that conversation. Pickford alone could only have been tried at the term of the court at which he appeared, because the others had not been arrested. If there is any good reason why the parties should be tried together the practice is to wait a reasonable time to secure the arrest of the other defendants. In this case it had been made manifest, that the attendance of the other defendants could not be secured, and the court was of the opinion that there was nothing in the indictment and, therefore, it is very likely, insisted that so far as Pickford is concerned, the case should be disposed of. Where the testimony concerning one defendant would have been identical with that concerning all, there would have been good reason for waiting a reasonable time for the arrest of the other parties, if the court had been satisfied that there was any substantial offense charged in the indictment.

On his own behalf, Henry M. Talbott testified that he had heard the testimony of Judge Henderson and had since read the record of it. That he never made at any time or place the statements attributed to him in that testimony. He knows Andrew A. Lipscomb, but never had any arrangement or agreement with him directly or indirectly with respect to the collection of money for the benefit of the insurance companies, or any one of them. Never had any agreement, express or implied, with the insurance companies, or any one of them, for any fee, or for any action to be taken by me, either officially or individually in the interest of those companies, or for any purpose whatever. Never had any arrangement before or after the indictment of Pickford, Walter, Shaw, and Bradshaw, with James Hudson having for its object the use of the prosecution of these men in the interest of the insurance company.

Some other testimony offered by the defendants is omitted as immaterial, having apparently been offered in rebuttal of

some of the evidence of plaintiffs, before referred to as irrelevant.

Henry M. Talbott alone electing to appeal was granted a severance from his codefendants for that purpose.

Modern legislation, generally, authorizes the setting aside of judgments at law, after term, and the granting of new trials for good cause shown in petitions thereof addressed to the court rendering the judgment complained of. These remedies, by reason of their justice and efficacy, have largely superseded the practice of resorting to equity to obtain injunctions against the executions of such judgments. Their consequences are not so serious as those resulting from perpetual injunctions against executions, which forever conclude the plaintiffs in the judgments enjoined; for the extent of the relief obtained through the statutory remedies is to reopen the case for another trial of the issues by a jury in the same court. The plaintiff in judgment is afforded a chance to try the truth and weight of the newly discovered evidence, if that be the ground of relief, or to retry the case on its merits, if by accident or fraud, the opposing party may have been deprived of a fair trial, in the first instance.

There is no statute governing the proceedings in this jurisdiction in such cases, and the equity jurisdiction remains unaffected. It is well settled that it is within that jurisdiction to restrain a party from availing himself of a judgment obtained at law, if it be made clearly to appear that there are facts, which prove it to be against conscience, which facts the complaining party was prevented from availing himself of on the trial at law by fraud or accident, unmixed with any fault or negligence of himself or his counsel or agents. Marine Ins. Co. *v.* Hodgson, 7 Cr., 332-336; Hendrickson *v.* Hinckley, 17 Howard, 443-445; Crim *v.* Handley, 94 U. S., 652-659; U. S. *v.* Throckmorton, 98 U. S., 61-65.

The importance and value of the settled maxims of public policy, that there shall be an end of litigation, or that reported litigation between the same parties in regard to the same subject of controversy shall be prevented, make it an imperative condition of such relief that the party seeking it shall make it clearly appear that he had a good defense to the action, which, by fraud or accident he was prevented from making, and also that there was neither fault nor negligence on his part. In the language of the Court of Appeals of New York: "The conditions under which such claims can

be supported require at least the proof of extraordinary circumstances, the absence of laches, and the establishment of a case showing no reasonable doubt as to the conclusiveness of the discovered proof, the justice of the claim, and the merits of the controversy." Mayor, etc., *v.* Brady, 115 N. Y., 599-607.

Assuming, for the moment, that the newly discovered evidence elicited from the witness Henderson would be sufficient ground for restraining execution of the judgment, as decreed in this case, it was incumbent upon the plaintiffs to prove as well as allege, that the failure to discover evidence of the truth of the libelous charges, and plead the same by way of defense, was not through their own fault or failure of diligence. In our opinion they have not discharged this obligation. The publication assailed the fairness and integrity of the State's attorney, accusing him of using his position for the purpose of oppression and extortion, and was grossly libelous. Plaintiffs as defendants in that action, denied that the publication was made by them, or their authority or instigation. They did not plead the truth of the charges. In the trial they attempted to show the truth of the charges on the cross-examination of the plaintiff in the case. The evidence was rejected, and rightly so, because there was no plea to warrant its introduction. Pickford *v.* Talbott, 28 App. D. C., 498-505; 35 Wash. Law Rep., 28; S. C., 211 U. S., 199-208.

The bill for injunction alleges as the reason for the failure so to plead, that the parties had made diligent efforts to discover evidence to support such a defense, which proved futile, and had, in consequence, been advised by their counsel that to plead justification without some proof in support of the plea would possibly prejudice their case through a probable aggravation of the damages. This was a fact in issue, and constitutes an essential foundation for the relief sought. A careful examination of the record discloses no evidence whatever in support of the allegation. One of the plaintiffs, Walter, was not offered as a witness at all, even to contradict the evidence of the witness Hudson (one of the parties charged with the conspiracy to extort money from him and Pickford through the prosecution in Maryland) to the effect that Walter had offered him $500 for an affidavit of facts in support of the bill. Neither Pickford nor his leading counsel in the action for libel who were witnesses testified to a

single fact tending to show that there had been any effort to discover any evidence of the truth of the charges or any advice not to plead justification because of the failure to discover evidence to support it.

This opinion might well have ended here, but the importance of the case and the questions involved warrant the discussion of other points.

Assuming, now, that the facts elicited from the lately discovered witness could not reasonably have been discovered before, that there was no lack of diligence in searching for like evidence, and that there was no fault or mistake in omitting to plead, we pass to the question: Is that evidence so certain and conclusive that it would, without reasonable doubt, have determined the action for libel in defendant's favor, could it then have been made available?

It must be borne in mind that the burden of proof of such facts would be upon the party pleading them. The witness, Judge Henderson, testified to a conversation had with Talbott about nine years before, of which he had no memorandum to refresh his memory. The difficulty of being able to report accurately an oral statement made to one, especially after a lapse of years, is too well known to require comment. Moreover, the testimony of the witness shows that he could not be equally certain in respect of some other conversations relating to the prosecution, then depending in his court. Talbott as a witness on his own behalf expressly denied making the statements attributed to him, but testified to having discussed certain questions of law relating to the form of indictment, and the extradition proceedings thereon. He also expressly denied any arrangement made, or contemplated with any one, by which he was, or expected to receive any pecuniary benefit from the prosecution of the several indicted persons. Considering the ordinary laws that govern human conduct, it would, under ordinary conditions, seem improbable that a lawyer of any capacity, holding the important office of State's attorney, would, without apparent motive, deliberately make a statement to any one, much less the judge of his circuit, that he was using the powers and opportunities of his office for private gain. The plaintiffs, appreciating this, allege it as one of the reasons why they made no inquiries to ascertain if such was the case. Again, the impression which the witness now has of the conversation would seem, in a measure at least, not to have been so strong at the

time. It does not appear that he rebuked the attorney, or warned him that the case must be promptly tried or dismissed. No notice was given to the members of the bar, that the conduct of the attorney might be investigated; the reason being that he did not care to do anything that might incur his enmity. When the indictment was called for trial, the request of postponement by Talbott was not denied, but offered to be granted upon condition that if not ready on the postponed date, the defendants should have a verdict of not guilty. Knowing of the pending action for the libel no information was given of this important fact, in the interest of justice.

We are not undertaking to say that the testimony is not to be believed, but to call attention to the circumstances that a jury would have been called upon to consider, had it been submitted to them with the burden of proof explained.

In the light of all the circumstances mentioned, we cannot concur with the learned justice below in the conviction that had this testimony all been before the jury, a different verdict would necessarily have been the result. It might have been so; but the possibility, or probability even, that a jury might have been influenced thereto, is not sufficient to warrant a decree forever enjoining the execution of a judgment regularly obtained in a court of law. There ought to be no reasonable doubt as to the result.

We have considered this case upon the assumption of the undoubted jurisdiction of equity to restrain the enforcement of a judgment at law, but we are not unmindful of the fact that it is not a perfectly settled question that the jurisdiction is not forbidden by the Seventh Amendment, which declares that: "No fact tried by a jury shall be otherwise examined in any court of the United States, than according to the rules of the common law." The point was made in the Supreme Court of the United States in the case of Fidelity Mut. Life Ins. Co. *v.* Clark, 203 U. S., 64-73, but was not found necessary to be decided; nor is it here.

For the reasons assigned, the decree will be reversed with costs and the cause remanded to the Equity Court with direction to dismiss the bill.

Reversed.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

THOMAS H. PICKFORD,
JOHN H. WALTER,
Appellants,
vs.
HENRY M. TALBOTT.
No. 910.

To the Honorable, the Chief Justice, and the Associate Justices of the said Court:

The petition of Henry M. Talbott, the appellee, respectfully represents:

I.

That on the 27th day of September, 1902, the appellee brought suit in the Supreme Court of the District of Columbia to recover damages against the appellants for libel.

II.

That the trial of said action resulted in a verdict and judgment on the 30th day of March, 1906, in favor of appellee for $8,500, and costs, with interest from the date of the judgment.

III.

From said judgment an appeal was taken to the Court of Appeals of said District, by which Court, on the 14th day of December, 1906, said judgment was affirmed.

IV.

From the said judgment of affirmance a writ of error was taken to this Honorable Court, and by its opinion and judgment on the 30th day of November, 1908, the said judgment of the Court of Appeals was affirmed.

V.

The time for issuance of the mandate on said affirmance by this Court expired on the 30th day of December, 1908, and said mandate was duly issued and sent to said Court of Appeals, and the mandate of said Court of Appeals was duly transmitted to said Supreme Court of the District of Columbia on January 2, 1909, and execution was issued on the judgment.

VI.

On the 8th day of January, 1909, the appellants filed their bill in said Supreme Court of the District of Columbia praying a perpetual injunction against the collection of said judgment on the ground, in substance, that during a casual conversation between one of appellants' counsel and a person named Henderson, said Henderson had made a statement of certain facts which if true would make the collection of said judgment inequitable.

Upon this bill a preliminary restraining order was passed and later after proof taken on the issues presented by the bill and answers the said injunction was made perpetual by a decree passed March 21, 1910.

VII.

From the last-mentioned decree the appellee appealed to the Court of Appeals of the District of Columbia, and on February 6, 1911, that Court reversed the decree below and remanded the cause, with directions to enter a decree dismissing the bill.

VIII.

From this decree the appellants appealed to this Court, and that appeal is pending in this cause.

IX.

The appellants applied to the court below to fix the penalty of a bond to operate as a supersedeas, and the penalty was fixed at $15,000.00.

The order fixing the penalty and allowing the appeal appears on page 165 of the Record.

It contains no provision preserving the injunction in force pending the appeal.

The bond appears on pages 165 and 166 of the Record, and is in the usual form, containing no reference to the injunction, and the endorsement by appellee's counsel refers only to the fact that the *surety is satisfactory*.

X.

Petitioner is advised, and avers, that under the doctrine settled by repeated decisions of this Court the intrinsic effect of the decree of the Court of Appeals reversing the decree below and remanding the cause, with directions to dismiss the bill, was to put an end to the said injunction, and to leave petitioner at liberty to proceed to collect said judgment. But petitioner and his counsel are unwilling even to appear to disregard the pendency of this appeal by taking any action in the direction of collecting said judg-

ment pending said appeal without first bringing the matter to the attention of this Court and obtaining its leave to proceed pending the appeal.

Petitioner therefore prays:

I.

That he may have leave of this Court to file this petition.

II.

That he may have leave to proceed to collect the said judgment pending this appeal.

III.

That such further order may be made herein as may be necessary.

HENRY M. TALBOTT.

JOHN RIDOUT,
Attorney for Petitioner.

DISTRICT OF COLUMBIA, *to wit:*

On this 9th day of September, 1911, before the undersigned, personally appeared Henry M. Talbott, who being first duly sworn, deposes and says that he has read the foregoing petition by him subscribed and knows the contents thereof; that the facts therein stated upon his personal knowledge are true, and the facts stated upon information and belief he believes to be true.

HENRY M. TALBOTT.

Subscribed and sworn to before me this 9th day of September, 1911.

WALTER C. ENGLISH,
Notary Public,
District of Columbia.

BRIEF FOR PETITIONER.

The case is fully stated in the foregoing petition, and the sole question is:

Is the appellee at liberty now to proceed to collect his judgment notwithstanding the pendency of this appeal?

This question has been settled by repeated decisions of this Court in favor of petitioner's contention that he is so entitled.

Slaughter House Cases, 18 Wallace, 273.
Hovey vs. McDonald, 109 U. S., 150.
Leonard vs. Ozark Land Co., 115 U. S., 465.
Knox County vs. Harshman, 132 U. S., 14.
Bank vs. City of Clay Center, 219 U. S., 527.

In the case last cited the doctrine is thus felicitously stated:

> "The force and effect of a decree dismissing a bill and discharging an injunction is neither superseded nor annulled as a mere consequence of an appeal to the Supreme Court even if supersedeas is allowed."

This being the law, and counsel for appellants not having seen fit to avail themselves of the provisions of the Rule 93 of this Court, it follows that petitioner is in contemplation of law no longer restrained from enforcing his judgment by reason of any decree of the Supreme Court of the District of Columbia.

But the dignity of this Court requires that the utmost respect should be paid to its jurisdiction on appeal, and so petitioner is not willing to assume to decide the important question of the effect of this appeal, merely as such, and with no preserving clause in the order allowing the appeal, and he therefore feels it to be his duty respectfully to sub-

mit the question to this Court for its decision by asking leave of the Court to proceed pending the appeal.

From the statement of the history of this case it will appear that for nine years petitioner has been seeking reparation for the great wrong thrice judicially decided to have been done him, and it is submitted that the possibility of the occurrence of such great delay under the present systems of procedure affords a most potent argument in favor of the recent wise action of this Court in taking steps to reform such procedure.

Notwithstanding that the rule of law seems so clear, inasmuch as the appellate jurisdiction of this Court and its scope and effect are here involved it seems to counsel for petitioner that it is his plain duty to take the opinion and judgment of the Court in the premises instead of acting upon his view of the law applicable to the situation.

It is also submitted that in dealing with this application it is proper for this Court to take into account that by reason of the great volume of judicial labor cast upon the Court, this case cannot normally be reached for decision for two years or more.

Finally, and with the utmost respect, it is suggested that if the Court should see fit to accompany its action on this petition with some expression of its views on the extremely important question of appellate procedure and practice involved, it would be most helpful in the guidance of the lower Courts and practitioners therein in similar cases in the future.

All of which is respectfully submitted.

JOHN RIDOUT,
Attorney for Petitioner.

Messrs. SAMUEL MADDOX,
H. PRESCOTT GATLEY,
HENRY E. DAVIS,
Attorneys for Appellants.

Please take notice that the foregoing petition and brief in support thereof will be submitted to the Court on Tuesday, October 10, 1911, at the opening of the Court on that day or as soon thereafter as Counsel can be heard.

JOHN RIDOUT,
Attorney for Appellee.

22

Office Supreme Court, U. S.
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JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

No. 512.

THOMAS H. PICKFORD AND JOHN H. WALTER, *Appellants,*
vs.
HENRY M. TALBOT.

REPLY BRIEF OF APPELLEE ON HIS PETITION FOR LEAVE TO COLLECT JUDGMENT PENDING APPEAL.

Two reasons why the relief prayed should not be granted are urged in the Appellants' brief:

1.

That payment of the judgment by appellants under coercion of execution would convert this appeal into a Moot case.

2.

That in the event of payment of the judgment and subsequent reversal of the decree of the Court of Appeals, the appellants could not reclaim the money paid by them.

Of these in their order:

1.

The doctrine is and for many years has been well settled that payment of a judgment under coercion of execution pending an appeal does not affect the appeal because of the ample power of the Court to enforce restitution.

Bank of United States vs. Bank of Washington, 6 Peters, 8.

Northwestern Fuel Co. vs. Brock, 139 U. S., 220.

As to the second point:

There is no proof of appellee's insolvency in the record; on the contrary, there is a total failure of such proof (as indeed there is of any competent proof to sustain the bill), and this in the face of an explicit denial of insolvency and showing of solvency. Record, 33 and 34.

But this is a mere detail, and counsel for appellee is is authorized by him to consent that, if deemed proper by the Court, the appellee will give any security the Court sees fit to require for the return of the fund in case of reversal for he feels the utmost confidence in the accuracy of the former judgments of this Court and of the Court of Appeals in the premises.

JNO. RIDOUT,
Attorney for Appellee.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 910.

THOMAS H. PICKFORD ET AL., APPELLANTS,

vs.

HENRY M. TALBOTT.

The Answer of Thomas H. Pickford and John H. Walter, Appellants, to the Petition of Henry M. Talbott, Appellee, Herein Filed, Asking Leave of this Court to Collect the Judgment, Collection of Which Judgment Has Been Perpetually Enjoined Herein, Pending the Appeal of this Cause.

I. They admit the allegations of paragraphs one, two, three, four, and five of said petition.

II. They admit the allegations of paragraph six of said petition, except the allegation that the bill filed by them was grounded upon a casual conversation between one of their counsel with a person named Henderson.

Further answering said paragraph they say that said bill was based upon evidence discovered by them subsequent to the issuance of the mandate of this court as set forth in the fifth paragraph of said petition, which evidence could not, by the exercise of the utmost diligence on their part, have been discovered by them, or either of them, at any earlier date; and which evidence showed that the procurement of the judgment by appellee against them, as set forth in the second paragraph of said petition, was the result of gross fraud perpetrated by said appellee upon the courts of the District of Columbia and these appellants; that had the evidence so as aforesaid discovered by them been available at the time of the trial of the appellee's action at law, it would have constituted a perfect defense to said action; and that they were deprived of such defense by the fraud of the appellee.

III. They admit the allegations of the seventh, eighth, and ninth paragraphs of said petition.

IV. Answering the tenth paragraph of said petition they say they are advised by counsel that the effect of the decision of the Court of Appeals of the District of Columbia was not to put an end to the injunction issued in this case by the Supreme Court of the District of Columbia and to permit the appellee to proceed to collect said judgment pending the appeal in this court. To the contrary hereof, they aver that said Supreme Court of the District of Columbia has no official knowledge of the action of said Court of Appeals, and cannot have such knowledge until the mandate of said Court of Appeals is issued.

That rule 23 of the rules of practice of said Court of Appeals provides:

> "All motions for reargument, or for modifications of judgments or decrees, shall be made in writing and filed with the clerk of the court within fifteen days from the time of the opinion or judgment de-

livered; and it shall be the duty of the clerk of this court to deliver a copy of such motion to each member of the court without delay, *and during such period of fifteen days no mandate shall issue unless upon special order of the court for cause shown.*"

Further answering said paragraph they say that within said period of fifteen days, and before the issuance of the mandate of said Court of Appeals and pursuant to the order of said court, they were allowed an appeal to this court, and the penalty of the bond on such appeal, *to act as a supersedeas*, was fixed in the sum of fifteen thousand dollars, and that within said period of fifteen days and before the issuance of the mandate of said court such supersedeas bond was approved and filed in said Court of Appeals. They are advised by counsel, and therefore aver, that the effect of the giving by them of said supersedeas bond, as aforesaid, was and is to stay the issuance of the mandate of said Court of Appeals until the determination by this court of their appeal herein; and they say as matter of fact that such mandate has been stayed and has not been issued.

V. Further answering said petition they say that said Henry Maurice Talbott, appellee herein, is insolvent; and that if he be allowed to collect said judgment pending the appeal herein they will suffer great and irreparable injury, because in the event of the reversal of the decree of the said Court of Appeals which is sought by this appeal they would be unable to recover back the amount of said judgment from said appellee. On the other hand, they aver that said appellant Pickford is the owner of property the value of which is greatly in excess of the amount of said judgment, upon which property said judgment is a lien, and that because of this fact, and the further fact that the security of said supersedeas bond is amply sufficient to guarantee payment of said judgment in the event of the affirmance of the decree of the said Court of Appeals, no harm

or injury can come to said appellee herein by awaiting the final determination of said appeal.

Further answering said petition they say they are advised by counsel that if the appellee be permitted to collect said judgment pending the appeal herein, then and in that event said appeal would present but moot questions and would be dismissed by this court. They are advised by counsel that their appeal herein is a valid appeal under existing laws, and their right to have said appeal heard and determined by this court is a valuable right, of which they cannot be deprived by any act of said appellee.

And having fully answered said petition they humbly pray that the same be dismissed, with costs.

THOMAS H. PICKFORD.
JOHN H. WALTER.

HENRY E. DAVIS,
SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Appellants.

DISTRICT OF COLUMBIA, *ss:*

Thomas H. Pickford and John H. Walter, being first duly sworn, depose and say: We have read over the foregoing answer by us subscribed and know the contents thereof; the facts therein stated upon our personal knowledge are true, and the facts therein stated upon information and belief we believe to be true.

THOMAS H. PICKFORD.
JOHN H. WALTER.

Subscribed and sworn to before me this 7th day of October, A. D. 1911.

[SEAL.]

JOHN P. MCMAHON,
Notary Public, D. C.

ARGUMENT.

The appellee relies upon the proposition stated in Bank *vs.* City of Clay Center, 219 U. S., 527, and on the cases cited in support thereof, namely:

> "The force and effect of a decree dismissing a bill and discharging an injunction is neither superseded nor annulled as a mere consequence of an appeal to the Supreme Court even if supersedeas is allowed."

This proposition is not questioned, but it has no application to the case at bar, the situation of which is this:

In the Supreme Court of the District of Columbia the appellants procured a decree perpetually enjoining the collection of the judgment in question. From this decree the appellee took and completed an appeal to the Court of Appeals of the District of Columbia whereby the jurisdiction of the Supreme Court of the District in the case was superseded and supplanted, it being the uniform holding of this court that an effective appeal ousts the lower court of jurisdiction. The Court of Appeals, upon hearing the appellee's appeal, rendered a decision, and passed a decree accordingly, that the decree of the Supreme Court of the District should be reversed and the cause remanded to that court with directions to dismiss the bill of complaint. Before the mandate of the Court of Appeals was sent down to the Supreme Court of the District, the appellants took an appeal to this court, perfecting the same by giving an adequate bond, which was conditioned and approved to operate as a supersedeas.

Accordingly the case is here, not on an appeal from a decree "dismissing a bill and discharging an injunction," but from a decree having that intention but arrested and stayed in its effect by the appeal to this court. In contemplation of law, therefore, the Supreme Court of the District not having received the mandate of the Court of Appeals, and

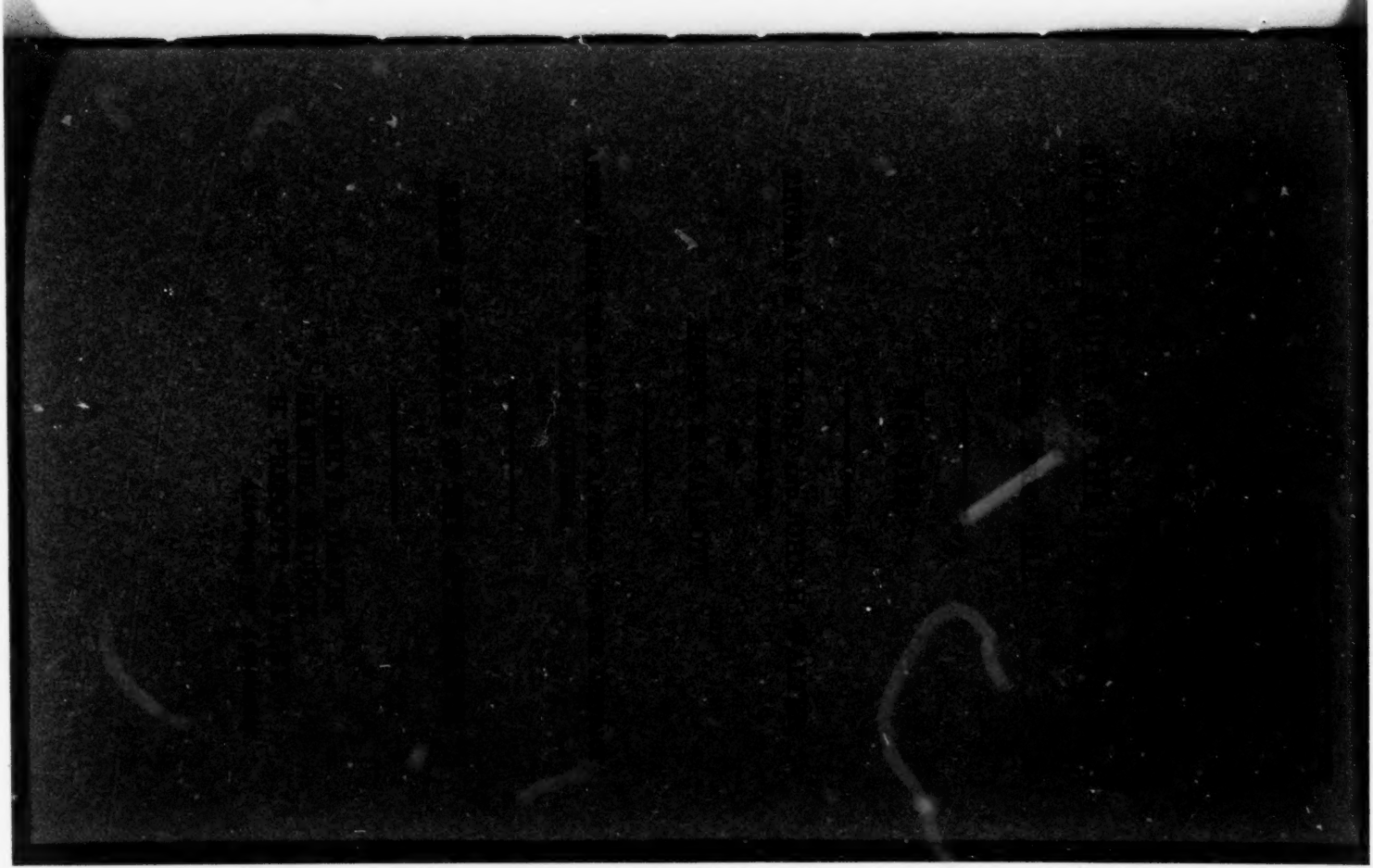
knowing from its own record in the case only that there has been taken and perfected an appeal which ousted it of its jurisdiction, not only is without power to take any step in the cause, but also is ignorant of the fact that its action has been directed to be reversed.

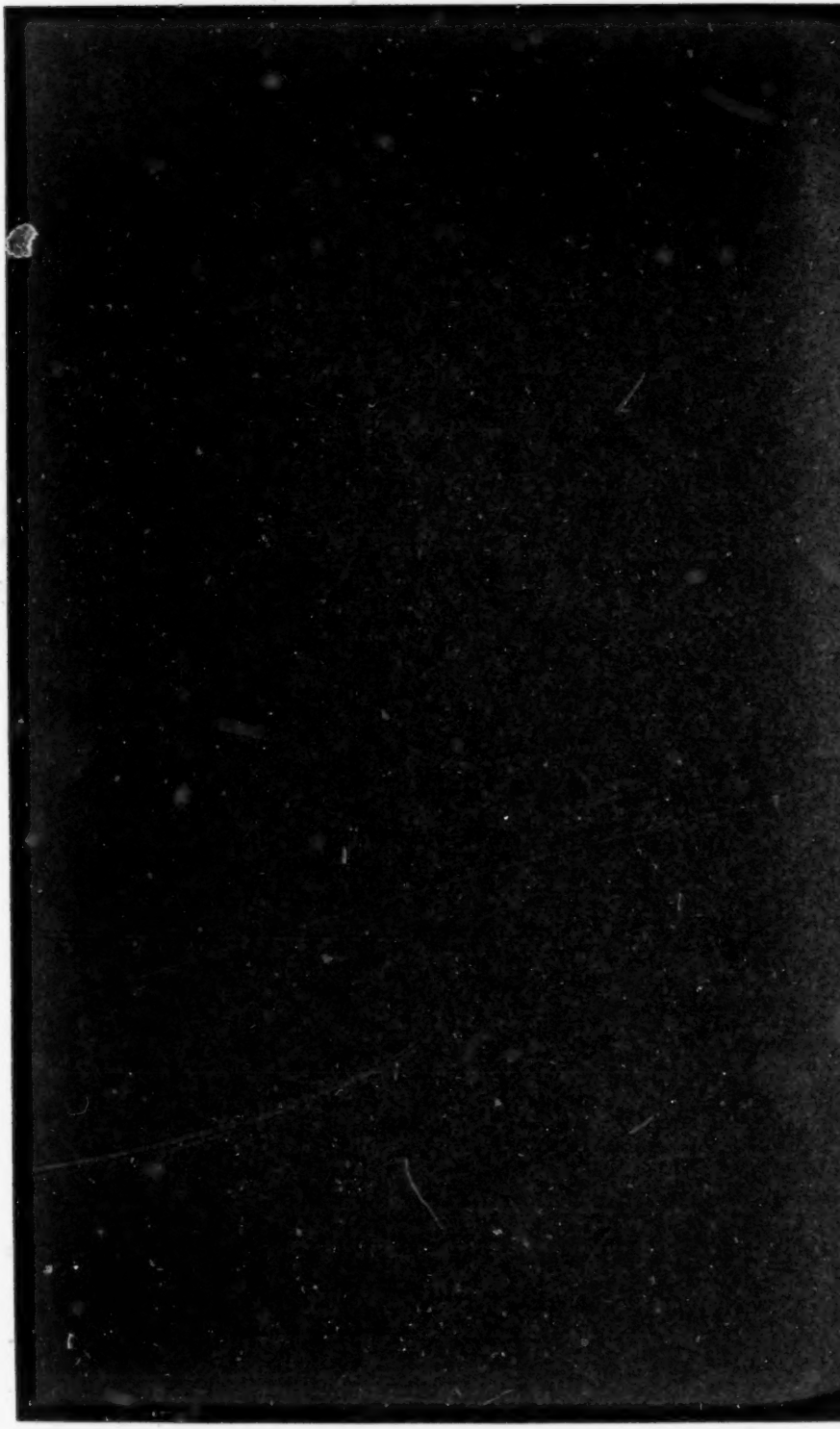
What is asked of this court, therefore, is action, the effect of which would be to direct a court, namely, the Supreme Court of the District of Columbia, to permit something to be done in a case in which it has no power, and no jurisdiction, to do anything; the result of which action, if taken by this court, would moreover be in effect to nullify the appeal herein, leaving the judgment in question to be collected, and the questions presented on the appeal mere moot questions.

It surely is not necessary to argue the impropriety, not to say the impossibility, of such a course, or to fortify by further suggestion the wide and clear distinction between the situation involved in the cases cited for the appellee and the situation of the case at bar.

For these reasons it is respectfully submitted the prayer of appellee's petition should be denied and the petition dismissed.

HENRY E. DAVIS,
SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Appellants.





INDEX.

	Page
Statement of Facts	1
Assignments of Error	9
Argument on the Facts	10
a. The indictment did not charge any offense under the laws of Maryland	10
b. The circumstances leading up to the indictment and Talbott's subsequent anxieties about Hudson	11
c. Talbott at no time manifested an intention to bring the indicted parties, or any of them, to trial under the indictment	14
d. An examination and comparison of the facts and circumstances charged in the bill and developed by the testimony demonstrates that Talbott's purpose in procuring the indictment at Rockville was to subserve some personal end of his own	17
e. Had the evidence of Judge Henderson been available at the trial of the libel suit, there could have been but one result—a verdict for the defendants	23
Argument on the Law	26
As to the first, second, third, fourth, and fifth assignments of error	26
As to the sixth, seventh, and eighth assignments of error, and reply to brief of appellee	37

TABLE OF CASES.

	Page
Fitch *v.* Polk, 7 Blatchford, 564	40
Fidelity Mut. Life Ins. Ass'n *v.* Clark, 203 U. S., 64	41
Gardiner *v.* Hadley, 12 Gill & J., 365	40
Iglehart *v.* Lee, 4 Md. Ch., 514	40
Mayor, &c., N. Y. *v.* Brady, 115 N. Y., 599	43
McGuire *v.* Drew, 83 Cal., 229	45
Maryland Steel Co. *v.* Marney, 91 Md., 369	47
Marine Ins. Co. *v.* Hodgson, 7 Cranch., 336	37
Ocean Ins. Co. *v.* Field, 2 Story, 72	39
Pickering *v.* Cassidy, 93 Me., 139	45
Pico *v.* Cohn, 91 Cal., 129	47
Powers *v.* Butler, 4 N. J. Eq., 465	41
Reed *v.* Harvey, 23 Ark., 44	40
Stitt *v.* Huidekoper, 84 U. S., 385	23
Stowel *v.* Eldred, 26 Wis., 504	53
Taylor *v.* Railroad Co., 86 Tenn., 228	40
United States *v.* Throckmorton, 98 U. S., 61	49
Williams *v.* Lee, 3 Atkyns, 223	39
Zimmerer *v.* Freemont Nat'l Bk., 59 Neb., 661	45

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911.

No. 512.

THOMAS H. PICKFORD AND JOHN H. WALTER,
APPELLANTS,

vs.

HENRY M. TALBOTT.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF IN BEHALF OF THE APPELLANTS.

I.

Statement of Facts.

In May, 1897, the appellants (hereinafter for convenience designated "complainants") purchased a mansion-house in Montgomery County, Maryland, near what is known as Four Corners. At the time the house was insured for $35,000, which complainants reduced to $27,000. They then entered

upon alterations and repairs to the house at an estimated cost of $3,000, and had expended a considerable portion thereof during the latter part of August and the early part of September of that year. Shortly thereafter, viz: on September 13, 1897, the house was destroyed by fire; and demand being made upon the insurance companies for the payment of the insurance money, they declined to pay the same, upon the ground, among others, that the making of the alterations and repairs had been entered upon without due authority or permission from them, the companies, or some of them. Complainants thereupon, in February, 1898, entered suit against the companies; in less than a month the matter was settled out of court by the payment by the companies to complainants of $22,500.

At the time of the fire A. H. Kilgour was State's Attorney for Montgomery County, and continued such until January 1, 1900. During his incumbency of that office Mr. Kilgour investigated the circumstances of the fire, but learned nothing inducing him to believe that it was other than accidental.

After the insurance companies had paid complainants the $22,500, Mr. Kilgour received a telegram from Andrew A. Lipscomb, one of the defendants, inviting an interview at his (Lipscomb's office in Washington on a matter of importance. Mr. Kilgour responded to the invitation; and Lipscomb told him that the crime of arson had been committed in the burning of the house, and a client of his had guilty knowledge thereof or was an accomplice therein; but he declined to give the name of this client to Mr. Kilgour unless the latter, as State's Attorney, would promise Lipscomb's client immunity in the premises, and this Lipscomb says was promised and in writing (R., p. 108); and this notwithstanding that, as Lipscomb testified, he did not give Kilgour the name of his client (R., p. 109). Nothing further was done in the matter during Mr. Kilgour's incumbency of the office of State's Attorney. It ultimately transpired that Lipscomb's client was one James Hudson.

On January 1, 1900, more than two years and three months after the fire, Mr. Kilgour was succeeded as State's Attorney for Montgomery County by the appellee, Talbott. In March, 1901, more than fourteen months after he was installed in office and three and a half years after the fire, Talbott procured the complainants, one Shaw and one Bradshaw to be indicted for arson in burning the house above mentioned. The indictment was procured on the unsupported testimony of Hudson. Talbott says that the first notice he had in the premises was through a letter from one Thompson, living in Washington, a man whom he (Talbott) did not know and had never seen prior to the receipt of the letter, and that Thompson introduced him (Talbott) to Hudson, of whom, also, up to that time, Talbott had never heard, and who was a perfect stranger to him. It is uncontroverted that it was upon the testimony of Hudson alone that the indictment was procured.

Notwithstanding that prior to being brought together by Thompson, Talbott and Hudson were entire strangers to one another, it is admitted by Talbott that some time before the indictment he furnished $75 to Hudson to enable him to take up a chattel trust on certain of his property (R., p. 56), which Talbott says he did purely out of sympathy; and Talbott also gave Hudson $15 in money to be expended in working up the case (R., p. 57). Talbott charged the $15, but did not charge the $75, against the county (*Ibid.*).

Pickford, hearing of the indictment, immediately went to Rockville, where he gave bail for his appearance. The other defendants in the indictment were arrested here on requisition of the Governor of Maryland, but were discharged through *habeas corpus* proceedings by Mr. Justice Bradley, who held that the indictment did not charge a crime (R., p. 51).

Some time previously—viz: in November, 1900—one Hopp, then a customer of Pickford's at his grocery store in Washington, and whom Pickford had known about three

weeks, came to the latter's store and stated that Hudson (who was a friend of Hopp's) and Talbott were hunting up witnesses to convict him (Pickford) of having caused the burning of the house. Pickford treated the matter lightly; and Hopp said "For a small matter of $500 I can fix it for you." Pickford turned Hopp off with the statement that he would not be blackmailed (R., p. 6).

Again, in February, 1901, Hopp appeared at Pickford's store, flourishing Talbott's check for $75, which he said belonged to Hudson, and that it represented in part the money Talbott was going to pay in order to convict Pickford. Pickford again turned Hopp off and declined thereafter to have anything to do with him, or to extend him further credit (R., p. 6).

These attempts to induce Pickford to pay money to "fix it" having thus failed, the indictment at Rockville followed in the ensuing month. On Pickford's return, after having given bail at Rockville, he was told at his store that Hopp wanted to see him. The two met, when Hopp stated that it was a pity that Pickford had not settled the matter for $500, adding that it might be fixed even then, but might cost more money.

By this time Pickford had become satisfied of the existence of a conspiracy to blackmail him, and, so suspecting, consulted the District Attorney. By direction of their chief, two detectives of the District of Columbia were detailed to work on the case, and by their arrangement three interviews between Hopp and Pickford were had. The detectives sat behind a screen in Pickford's office, where the interviews were had, and overheard what passed thereat. At the first Hopp said to Pickford: "It would have been better for you to settle for $500;" and Pickford inquired if $2,500 would settle the matter. Hopp replied that he did not know, but that he would see Hudson and find out. At the second interview Hopp reported that Hudson would not settle except in the presence of his attorney or a notary public.

Pickford would not assent to this, but said, "Let Hudson come down here and I will settle with him." No definite offer of money was made at this interview, and a third interview was had. This occurred about two o'clock on the afternoon of April 3, 1901. At this interview Hopp said: "Pickford, you are up against it; this man wants $11,500, and will not settle for any less." Though demurring, Pickford pretended to comply with this demand, handing Hopp $200 in cash, giving him a promissory note for $3,000, and telling him to come back later in the day for the remainder. Hopp then left and went to his place of business, the Twentieth Century café, where Hudson was waiting for him. When Hopp walked in, and before there was opportunity for a division of the money between him and Hudson, both were arrested by the detectives. With this arrest Pickford was not immediately concerned, and in fact did not know when the detectives left his place that they intended to make the arrest; but later in the day he was summoned to the office of the chief of detectives and there requested to swear out a formal warrant against Hopp and Hudson, which he did, charging an attempt to blackmail.

The trial of Hopp and Hudson in the police court began the next day, and was completed on April 5. At this trial, which was merely preliminary to a possible indictment, Talbott was present, and keenly interested in all that occurred. He was called as a witness, and testified that he had come from Rockville to attend the trial.

Some days later Pickford brought suit against Hopp on a promissory note for $250 before a justice of the peace. At this trial Hopp had Hudson as a witness. Here, again, Talbott appeared, and though he did not enter the justice's room during the trial, he remained on the outside, frequently called Hudson out of the room, and appeared much excited while the trial was in progress. When on the witness stand at this trial Hudson declined to answer a question put to him on the ground that it might incriminate him, saying, "I anticipate indictment in Maryland."

With full knowledge of all these matters, Pickford went to Rockville for trial in November, 1901, on a day previously assigned therefor. When the case was called, Talbott, the State's attorney, treated it more or less lightly, and said that he was not ready to go to trial, though the indictment had then been pending eight months. His manner caused one of the judges of the court to rebuke him, and this was heard by Pickford, who not unnaturally concluded that Talbott was using the criminal proceeding to subserve some other end than the public good. Talbott asked for a continuance of the case, which one of the judges was disposed to grant, provided that Talbott would agree that if he should not be ready to go on with the trial on a new day to be fixed a plea of "Not guilty" should be confessed by the State; whereupon Talbott entered a *nolle pros.* against Pickford. Throughout these proceedings Hudson was present in the court at Rockville (R., p. 62).

In the month following this unsuccessful attempt of Pickford to have a trial on the indictment an article appeared in the "Sunday Globe," published in Washington, charging in effect that Talbott had been guilty of an abuse of his official position and had prostituted his office in procuring the indictment. Thereafter, in September, 1902, Talbott instituted a suit for libel against Pickford and Walter, charging them with responsibility for the publication in the "Sunday Globe." To this action Pickford and Walter pleaded the general issue, under which, although they could not plead in justification the suspicious circumstances pointing to Talbott's abuse of his office in procuring the indictment, they were yet permitted to offer proof of the same and of their knowledge thereof as tending to rebut the presumption of malice. The jury, under the court's instructions, finding the relations of Pickford and Walter to the publication such as to make them responsible for its appearance, rendered a verdict for $8,500 against them. Upon this verdict judgment was rendered, which was affirmed in the

Court of Appeals and afterwards in this court. The mandate of this court was due to issue December 30, 1908.

On the preceding day—viz: December 29—one of the counsel of Pickford and Walter in the libel case meeting by chance Judge Henderson, one of the judges of Montgomery County who was on the bench when the indictment was returned, and also at the time of Pickford's attempt to obtain a trial, the latter related to counsel the substance of an interview that he had had with Talbott in the summer of 1901, some months after the *habeas corpus* proceedings at Washington, and the declaration therein by Justice Bradley that the indictment did not charge a crime. The purport of what Talbott said in the interview clearly was that he (Talbott) was keeping the indictment open because he was interested in a large fee, stated to be about $11,000, which was expected to be realized through a recovery from Pickford and Walter, or one of them, of the money which they had received from the insurance companies.

Thereupon, on January 8, 1909, the bill of complaint in this case was filed, having for its object the enjoining of the collection of the judgment in the libel case, upon the ground that the statement of Talbott to Judge Henderson proved the truth of the alleged libel, and that Talbott in procuring the indictment against Pickford and Walter had been guilty, as charged in the publication in the "Sunday Globe," of abuse of his official position and prostitution of his office and of the use of his office for his personal ends and gain, and that under the circumstances it would be contrary to equity and good conscience that collection of the judgment should be permitted.

The testimony of Judge Henderson is at pages 93 to 100 in the record, and must be read in full to be adequately appreciated. The conversation between Judge Henderson and Talbott occurred shortly after three of the persons indicted had been discharged on *habeas corpus* by Judge Bradley. In this interview Judge Henderson stated to Tal-

bott that he had himself looked into the validity of the indictment and had reached the same conclusion announced by Judge Bradley. From these views Talbott expressed dissent and added that he was especially interested in the conviction of the defendants because he believed the insurance companies had been defrauded and might recover if the defendants were convicted, and that a large fee was involved in the matter, something like $11,000. Talbott did not indicate in this conversation who would be the recipients of this fee further than saying: "We represent the insurance companies who have paid this money." He did not say who constituted "we" (R., p. 94).

In his answer to paragraph 12 of the bill charging that he had had this conversation with Judge Henderson at the time mentioned Talbott says: "The nearest approach to any such conversation as set forth in the bill, and said affidavit (being the affidavit of Judge Henderson), is that on one occasion when these indictments were under discussion between this defendant and said judge either he or this defendant expressed the opinion that the insurance companies could recover what they had paid complainants" (R., p. 18.)

II.

Assignments of Error.

The court below erred as follows:

(1) In holding that whether the appellants had made diligent efforts to discover evidence to support a defense of the truth of the said charges which proved futile and had in consequence been advised by their counsel that to plead justification without proof in support of the plea would possibly prejudice their case through probable aggravation of the damages was a fact in issue.

(2) In holding that the failure to discover evidence of the truth of the libelous charges and plead the same by way of defense was through the fault or failure of diligence of the appellants.

(3) In holding that the evidence of the witness Henderson was not so certain and conclusive that it would without reasonable doubt have determined the action for libel in the appellants' favor could it have been made available on the trial.

(4) In not holding that had the said evidence been before the jury on the trial a different verdict would necessarily have been the result.

(5) In not giving due consideration and weight to the said evidence.

(6) In not affirming the decree of the Supreme Court of the District of Columbia.

(7) In reversing the decree of the Supreme Court of the District of Columbia.

(8) In directing that the bill of complaint be dismissed.

III.

ARGUMENT ON THE FACTS.

a. The indictment did not charge any offense under the law of Maryland.

This clearly appears from the lucid opinion of Justice Bradley, in which the indictment is set forth and analyzed (R., pp. 48-51). The indictment is as follows:

> "STATE OF MARYLAND,
> *"Montgomery County, To wit:*
>
> "In the Circuit Court for Montgomery County.
>
> "The grand jurors of the State of Maryland, for the body of Montgomery county, upon their oaths and affirmations present, that Granville C. Shaw, Aaron Bradshaw, Thomas H. Pickford and John H. Walter, late of said county, on the eleventh day of September, in the year of our Lord, eighteen hundred and ninety-seven, at the county aforesaid, a certain untenanted dwelling house, of the property of the said Thomas H. Pickford and John H. Walter, there situate, unlawfully, wilfully, and maliciously did set fire to, and the same house, then and there, by such firing as aforesaid, unlawfully, wilfully and maliciously did burn and consume, contrary to the form of the act of Assembly in such case made and provided, and against the peace, government, and dignity of the State.
> "Signed by the State's attorney, and indorsed 'a true bill' by the foreman of the grand jury."

The most cursory examination of the instrument compels the conclusion that it could not have been drawn or procured with any thought of securing a conviction thereunder. In its simplicity it charges owners with burning their own

property; and if the prosecutor pretended to believe that the burning was with intent to defraud the insurance companies, the instrument wholly fails to show that he had the courage to give expression to this pretense. In the light of subsequent events, as shown by the testimony, the conclusion would seem inevitable that the indictment was drawn or procured to subserve some other purpose than vindication of the law.

b. The circumstances leading up to the indictment and Talbott's subsequent anxieties about Hudson.

The fire occurred in September, 1897. Kilgour was then State's attorney for Montgomery county. The fire caused some comment because of the character of the building, but there seems to have been at the time no suspicion of wrongdoing by any one connected with the ownership of the property. Six months later Lipscomb appeared on the scene. He wired Kilgour to come to see him at his office in Washington, and Kilgour came as requested. Lipscomb then told Kilgour that a poor client of his was much "perturbed" in spirit (R., p. 104) because of the fire, of which he had guilty knowledge, or in which he was an accomplice, Lipscomb was not quite clear which. Lipscomb said that he would not give the name of his client unless Kilgour promised immunity, as he did, in writing. This writing, he says, Kilgour gave, and it was passed along to Hudson. But after procuring this immunity Lipscomb did nothing further; he did not even give Kilgour the name of his much "perturbed" client. It would be interesting to discover the terms of an agreement granting immunity to an unknown and unnamed person. Lipscomb says he had not the slightest interest in further communication with Kilgour after he had procured this unique immunity. Why? There was a hint, a whisper, at the first interview that Pickford and Walter had received, then recently, a large sum of money

from insurance on the building, and possibly they might be persuaded to pay it back if a threat or pressure of criminal proceedings was properly applied. But Kilgour did not take the bait; he was not the man Lipscomb wanted to deal with, and so he straightway dropped the matter from his mind.

Nothing further was heard of the supposed crime during the remainder of Kilgour's term of office. On the 1st of January, 1900, Talbott succeeded him as the State's Attorney at Rockville. By that time the fire was remembered only as a thing of the past, if ever thought of at all. But it was soon to be revived. Talbott, shortly after undertaking the duties of his new office, received a vague and indefinite letter from a man named Thompson, a stranger to him, and the proprietor of a Washington paper. A little inquiry would have disclosed to Talbott that Thompson was, himself, of a somewhat unsavory reputation, given to sensations and ready to print, or not to print, items of news and gossip as might profit him in a pecuniary way. Thompson introduced Talbott to Hudson, whose very existence even up to that time was unknown to Talbott, and we next find Talbott and Hudson going together, in the fall of 1900, to Hopp's café for luncheon (R., p. 59). With Talbott in the chair at Rockville, Lipscomb does not appear to have been solicitous about his much "perturbed" client; and Hudson, even without any promise of immunity, revealed his identity to Talbott, and, no doubt, told some sort of story about the fire.

Although up to that time Hudson had been a stranger to him, Talbott loaned him $75 a month before the indictment was found. In explanation of this loan he says, "The old man appealed to me very strongly, and I helped him;" that it was a mere "personal and friendly loan" (page 60). When and why did the old man appeal to him so strongly? Talbott would have us believe that he came all the way from Rockville to find an object for his charitable inclination; and that object, too, a stranger.

A month after the indictment Hudson was arrested on

the charge of conspiring with Hopp, who figures so prominently in these proceedings, to blackmail Pickford in connection with this remarkable indictment. When the case was called in the police court Talbott was there. The case was not finished the first day, but Talbott was in court also on the second day and stayed to the end of the trial, late in the afternoon. His arduous duties as State's Attorney at Rockville and his other professional engagements did not relieve him from anxiety as to what might transpire at the police court here on the trial of the stranger, James Hudson.

A few days after this hearing was concluded Pickford sued Hopp on a note for $250 before Justice of the Peace Bundy. For some reason Hopp had his friend Hudson appear at the trial as a witness in his behalf. Talbott came down for this hearing also and, although he did not actually enter the Justice's room while the case was under trial, he stood on the street just outside and several times called Hudson out and counseled with him in a very excited manner. As well he might, for under cross-examination Hudson, when questioned about his relations to the insurance companies, had appealed to the Justice to be relieved from answering, on the ground that it might tend to incriminate him in Maryland and that he expected indictment in Maryland.

Lipscomb also attended this trial as counsel for Hudson—who was then only a witness—watching to see that no incautious word might be allowed to fall by Hudson which would shed light on the real motives that prompted the indictment.

What could have excited such great anxiety on the part of Lipscomb and Talbott about Hudson's movements and admissions, if the purpose of the Rockville indictment was only the punishment of the several persons accused of the commission of an offense against the law?

c. Talbott at no time manifested an intention to bring the indicted parties, or any of them, to trial under the indictment.

As shown, three of the persons named in the indictment who resisted extradition were discharged from arrest on *habeas corpus*. But Pickford did not wait to be arrested. On the day he learned of the indictment he consulted counsel about giving bond, went by an early train to Rockville, submitted to the jurisdiction of the court and gave bail for his appearance when wanted. Even after the judgment of Justice Bradley, holding that the indictment was bad, Pickford did not demur to the indictment or move to quash it in the court at Rockville. He was told that, though inartificially drawn, the spirit of the indictment was to charge him with arson, a heinous crime, and he tendered himself ready to answer that charge as soon as it could be presented before a trial jury in Talbott's own bailiwick.

The indictment was returned at the March term of the Circuit Court at Rockville, and the earliest time when Pickford could insist on a trial was the following November term of the court. On the opening of this term, he appeared in court by counsel and had a day fixed for the trial, some ten days later. Talbott was present in court when the day was fixed.

On the day appointed, Pickford went to Rockville with some persons who knew him, to testify if need be as to his character; for the trial was to take place in a community where he was a stranger and before a jury of strangers. Hudson was present in the court-room.

When the case was called, Talbott got up at once and read a letter from somebody connected with an insurance company, having reference to a possible witness who might know about the fire. After this reading he asked for a continuance so that he might go down to the Four Corners neighborhood and look for witnesses. Though the indictment had been pending eight months, he had not then seen

a single witness and apparently had not heard of any. Evidently he had not expected that Pickford would dare to face the trumped-up charge before a jury in a strange community and was, no doubt, greatly disappointed that he had not settled the case out of court. He had been State's Attorney for fourteen months before the indictment was found and for eight months afterward, and yet, in all that time, he had not heard of a single person or circumstance to corroborate the story of his star witness—the man introduced to him by Thompson of the Washington Chronicle.

The wonder is that Talbott did not look for witnesses before having his grand jury do so grievous a wrong to four citizens of Washington whom they did not know. That would at least have given an appearance of honesty to his proceeding and suggested that the purpose of the indictment was to uphold the majesty of the law. Plainly it was because the indictment was conceived in some other spirit and had some other object than the conviction of the persons accused.

To add to the theatrical features of the occasion, Talbott had procured Hudson to come from Washington to Rockville on the day fixed for Pickford's trial and he was present in court when the case was called. But Talbott knew the day before, and for some time before, that he had no intention to try the case on the day appointed. Why, then, did he have Hudson come up? Manifestly, it could only have been because he thought if he made this show and secured a continuance, Pickford would be more amenable to settlement out of court.

But Pickford showed no sign of fear—he insisted on a trial. Judge Henderson, who was presiding in court that day, was inclined to grant the continuance asked for, provided that if Talbott could not find any witness he would, on the part of the State, confess a plea of not guilty. To this Talbott would not consent, for reasons which he did not mention, and entered a *nolle pros.* as to Pickford.

The whole proceeding was so revolting that Judge Motter, the associate of Judge Henderson at the time, gave expression to some very caustic comments about the way in which Pickford had been treated by the State's Attorney.

At the next November term of this court, in 1902, the following year, Walter went to Rockville, pleaded not guilty to the indictment and gave bail for his appearance when wanted for trial. A day was thereupon fixed for his trial. On the appointed day he tendered himself ready for trial. Meanwhile another twelve months, or nearly two years in all, had passed since the indictment was found. This was certainly ample time for Talbott to scour all the woods and hedges of Montgomery County in search of witnesses, but apparently he had done nothing of the sort.

And even in his treatment of Walter's case he did not comport himself as a State's Attorney having the slightest regard for the rights of persons against whom he had made an accusation that he could not prove. He knew, when Walter appeared at Rockville and asked that a day be set for his trial, that he had not the slightest intention of bringing him to trial; but instead of entering a *nolle pros.* that day, he went through the form of having a day set, and thus subjected Walter to the expense of having counsel from Washington get ready for trial and attend court at Rockville.

On the day set for Walter's trial, Talbott did not even have Hudson at Rockville, or make any pretense of wanting to have a trial, but he entered a *nolle pros.* in the most perfunctory fashion.

From all of this there can be but one conclusion: That Talbott never had any idea or intention of bringing Pickford and Walter to trial under the indictment procured on the sole evidence of Hudson (an accomplice, as he himself avers), and without a single corroborating fact or circumstance that has ever been disclosed.

d. An examination and comparison of the facts and circumstances charged in the bill and developed by the testimony demonstrate that Talbott's purpose in procuring the indictment at Rockville was to subserve some personal end of his own.

Whatever Hudson, the client of Lipscomb, who was so "perturbed" in his mind by the fact that he had guilty knowledge of, or was an accomplice in, the burning, knew, he must have seen or heard at the time of the fire or immediately thereafter. But the account he gave in connection with the fire to his lawyer left the latter in the dark—he could not determine whether Hudson was an accomplice or was only the possessor of guilty knowledge.

On the surface, Hudson made no effort to ease his mind by a confession to his lawyer until after the insurance money was paid. But had he been quiet all this time? The fire occurred in September, 1897, and the insurance companies did not promptly respond to the obligations of the several policies on the property they had underwritten. Perhaps, and it is not at all unlikely, Hudson had attempted to sell his alleged "guilty knowledge" to the insurance companies. At any rate, they haggled about settling, and complainants promptly brought suits on the policies. If the insurance companies had felt disposed to place any reliance in Hudson's story, they did not consider it sufficient to constitute a ground of defense, for they settled the suits out of court. This they would not have done—and the officials of the companies would have been derelict in their duty to have done it—if there was any substance to Hudson's tale.

Hudson's next effort was to sell his information—his guilty knowledge—to Kilgour, the State's Attorney for Montgomery County, and, for this purpose, enlisted the assistance of Lipscomb, who, shortly after the insurance companies had repudiated Hudson's story and settled the lawsuits, wired Kilgour to come to Washington to see him

on a matter of importance. At the interview which took place, as both agree, Lipscomb spoke of a client of his who had guilty knowledge, or was an accomplice in the matter and asked for immunity, which he said was given. But after this Lipscomb says, and Kilgour agrees with him, that he took no further interest in the matter, not even to furnish the name of his conscience-stricken client. He would have us believe that he sought to obtain immunity for a man whose name was never revealed, nor was any hint given to Kilgour how to discover his identity and whereabouts. Why ask Kilgour to leave his business at Rockville and come to Washington to promise immunity to a supposed wrongdoer, who never came out of his hiding place during the remainder of Kilgour's term—a year and nine months?

But the attending circumstances clearly indicate that Lipscomb did not do, and had no mind to do, so vain a thing. Though Kilgour is not quite clear in his recollection of all that transpired, or exactly what was said, he yet remembered that Lipscomb told him he represented the insurance companies and that they would relinquish their claim to the money paid if Pickford and Walter could be made to pay it back. What actually transpired was, necessarily, more or less matter of inference. It was a matter about which Lipscomb proceeded very cautiously. It was a delicate matter. He was feeling his way in an effort to discover if Kilgour would take part in a scheme to make Pickford and Walter pay back the money they had received from the insurance companies. He could not make the direct inquiry, for he was not sure of his man. But he proceeded by indirection—said if the money was paid back the insurance companies would want none of it and that it could be divided amongst counsel having charge of the matter. This is the impression made upon Kilgour at the time, and his impression and inferences were just what anybody else would have derived under the circumstances. He was to be one of the counsel to share in the distribution

of the refunded insurance money, in return for such services as he might render in using his office as State's Attorney for Montgomery County.

But Kilgour showed no sign of a willingness to be a party to any such scheme, and Lipscomb therefore took no further interest in the matter—he did not give Kilgour Hudson's name or interest himself to see that the latter went to Rockville for the purpose of appearing before the grand jury and thus square himself with his own conscience. With Lipscomb it was a closed incident so far as Kilgour was concerned.

It is simply inconceivable that Lipscomb should have stopped so suddenly in his efforts to expose a crime of which his own client had guilty knowledge, or in which he was an accomplice, unless he had discovered that Kilgour would not be a party to an effort to extort money from Pickford and Walter through threat of criminal proceedings.

Nothing further transpired until the election of Talbott to the office of State's Attorney. This was more than two years after the fire. The account he gives of his connection with the matter is flimsy to the point of attenuation. He first heard from a newspaper man in Washington, whom he had not theretofore known, in a vague and indefinite letter, that an unpunished crime of arson had been committed in his jurisdiction during the official term of his predecessor. It was of a serious nature, involving the character of citizens of Washington whom he did not know, and the most natural thing for him to have done when it was first brought to his attention was to inquire of Kilgour what knowledge of the fire he had at or about the time of the occurrence. But he did no such thing. Without a word with Kilgour, he proceeded to respond to the vague and indefinite letter of the strange newspaper man, and was by him introduced to Hudson—up to that moment an utter stranger. Hudson, no longer caring for the immunity about which Lipscomb says he was at first so solicitous, told some story or other to Talbott, and was by the latter invited

to come before the grand jury at Rockville and repeat the story. The indictment followed. Talbott, in his capacity as legal adviser of the grand jury, must have told them that the testimony of Hudson was sufficient to form the basis of an indictment.

It has at no time appeared or been claimed by Talbott, that he was in possession of a single fact or circumstance to corroborate the story of Hudson. He knew, for he was deemed competent to occupy the office of State's Attorney; that conspirators cannot be convicted on the unsupported testimony of an accomplice. And Judge Henderson says that if his advice had been requested, he "would have advised the grand jury that they could not find an indictment upon the evidence of Hudson alone" (R., p. 97, folio 192). Prior to that time Talbott had shown Judge Henderson a paper purporting to be a confession of Hudson and inferentially showing the evidence Hudson gave before the grand jury. Wherefore it follows, as the night the day, that the conviction of the accused was not the purpose of Talbott in procuring the indictment.

It is impossible to conceive that he would be a party to indicting citizens of another jurisdiction, presumably law-abiding, whom he did not know, without any competent evidence whatever, but with the expectation that at some later time he might discover something that might be seriously presented to a trial jury. Talbott's conduct on the days specially fixed for the trials of Pickford and Walter unmistakably shows that he never expected to hear of a corroborating circumstance or witness, and that he had looked for none.

Though all the while suspecting that Talbott was in some way mixed up with the effort to extort from them the money that had been paid by the insurance companies, neither Pickford nor Walter, nor their counsel, could find any direct, tangible evidence of that fact. It came at the last moment, after the judgment in the libel suit had been

finally affirmed in the Supreme Court, and is of a most convincing character.

One of counsel for complainants, defendants in the libel suit, on the 29th of December, 1908, was at the railroad station at Rockville, when Judge Henderson came along taking an afternoon walk. It will be remembered that Judge Henderson presided in court when Pickford and Walter appeared for trial, and was more or less familiar with the entire proceedings from the time of the filing of the indictment, and even prior thereto. He had heard of the final affirmance of the judgment in the Supreme Court, *and supposed that the litigation was at an end* (R., p. 95). "For want of something else to talk about" (R., p. 97), he asked counsel if the judgment had been paid. Judge Henderson then recalled and narrated a conversation he had with Talbott shortly after the decision of Judge Bradley in the *habeas corpus* cases. He said that Talbott had come to see him several times and asked him to suggest some means by which the defendants, other than Pickford, could be brought within the jurisdiction of the court. In one of these conversations, Judge Henderson says he told Talbott that he himself had examined the law and agreed with Judge Bradley, and that it was scarcely worth while to pursue those prosecutions any further. What followed is best told in the words of Judge Henderson:

> "Mr. Talbott dissented from this interpretation of the law, and contended that it was sufficient to charge the offense in the words of the indictment, and then any evidence of corrupt motive could be adduced in support of the indictment at the trial. He stated that he was especially interested in convicting these defendants, because he believed that the insurance companies who had paid the insurance money after the fire had been defrauded; that he represented these insurance companies, and that if the defendants were convicted, it was probable the companies could recover the money that they had paid after the fire; that a large fee was involved in

> the matter. I understood him to say that in the event of success in the recovery, the fee would amount to about $11,000." He did not say who would be the recipient of the fee of $11,000. "He said 'We'—that is, according to my recollection—'We represent the insurance companies who have paid this money.'" He did not say who constituted the "We." (Rec., p. 94.)

Judge Henderson further stated on cross-examination:

> "I had been impressed by the fact that Mr. Talbott had, in his suit against Pickford, recovered a sum which was substantially equivalent to what his fee might have been had he recovered the claims for the insurance companies, and I thought he had been particularly fortunate; and that impression had been made on my mind when I heard the result of the case, and I suppose it continued there." (Rec., p. 97.)

In the light of this testimony there can be no doubt as to Talbott's motives in procuring the indictment, and keeping it open on the docket after the decision of Judge Bradley. That he was interested in convicting these defendants was merely subsidiary and incidental; what he was really working for was the fee of $11,000 if he could secure the return of the insurance money. He had then no civil suit pending in which recovery was sought, and his only hope was that Pickford and Walter would pay it back under pressure of criminal proceedings. As Judge Henderson puts it, Talbott said "we" have this large fee depending on the indictment being kept open. Though Talbott did not say who constituted the "we," we know now that Hudson was to share, and unfortunately it would appear that Lipscomb also was to have a share. And that the conversation related by Judge Henderson with the appellant occurred as related by the judge is not open to question. Apart from the wholly unsatisfactory attempt of the appellant to cast doubt upon the occurrence, an attempt which really does not rise to the

dignity of a denial, the settled rule of evidence applicable in the premises is thus stated by this court:

> "One of the errors assigned and insisted on grows out of this conflict in the testimony between the plaintiff and the two defendants, all of whom were sworn. The former denies the receipt of any such papers, and both the latter swear positively to their delivery to plaintiff.
>
> "On this subject the court charged the jury 'that it is a rule of presumptions that ordinarily a witness who testifies to an affirmative is to be preferred to one who testifies to a negative, because he who testifies to a negative may have forgotten. It is possible to forget a thing that did happen. It is not possible to remember a thing that never existed.'
>
> "We are of opinion that the charge was a sound exposition of a recognized rule of evidence, of frequent application."
>
> Stitt *vs.* Huidekoper, 84 U. S., 385.

As before shown, Talbott admits in his answer to the bill that he did have some talk with Judge Henderson about the right of the insurance companies to recover what they had paid complainants.

e. Had this evidence been available at the trial of the libel suit, there could have been but one result—a verdict for the defendants.

Properly to present this contention, it will be necessary to review the evidence in defense, offered at the trial of the action for libel, admitted by the trial justice, not in justification of the libel, but to rebut the presumption of malice and in mitigation of damages. In his answer to the averments of the bill reciting this evidence, Talbott admits that the substance of it was given, though he does not admit the truth of it, and calls the attention of the court to the character of said testimony as corroborating his contention that under the ruling of the trial justice, the fullest opportunity

was given to the complainants to introduce all testimony, which was done (R., p. 16). But at that time Pickford and Walter were not able to produce evidence directly connecting Talbott with the machinations of Hudson and Hopp, and could not have done so until a few days before the filing of the bill herein, and even then the new evidence was discovered by the merest accident.

The performance began in November, 1900, nine months after Talbott was installed as State's Attorney at Rockville, and more than three years after the fire. Presumably acting under directions or suggestions from headquarters, Hudson, *who about that time first met Talbott and went with him to Hopp's café,* then sent his friend Hopp to sound Pickford and see if he could pay anything to forestall prosecution at Rockville. Pickford was then engaged in the grocery business and had known Hopp, as a customer, and had extended to him a small line of credit. Hopp opened the conversation by inquiring if Pickford had not had some trouble once upon a time about a fire out in Maryland. To this Pickford replied that the insurance companies did not want to pay the losses, but had eventually settled the matter out of court. Hopp then said that Hudson and Talbott, State's attorney, were trying to get evidence to convict Pickford of having caused the fire and that for a small matter of $500 he could "fix it." To this Pickford replied that he would not be blackmailed. No further effort was made by Talbott or Hudson to reach Pickford until February, 1901, when Hopp again went to Pickford's store and flourished Talbott's check for $75, which Hopp said was part of the money Talbott was putting up to convict Pickford of arson. Thereafter Pickford refused to have anything further to do with Hopp and stopped his credit at the store. The indictment followed within a month. The day following the publishing of the notice of the indictment, and while Pickford was at Rockville giving bail, Hopp called at his store. A little later that day, or the next, Pickford met Hopp and was

then told that the matter could be settled yet, but it would take a little more money. Suspecting blackmail, Pickford sought the assistance of the authorities and as they advised arranged to have interviews with Hopp, all of which the detectives overheard. At the first of these Pickford said that he was sorry he had not settled the case for $500, and Hopp replied that it would have been better to settle it that way. Then Pickford wanted to know if it could be settled for $2,500. Hopp went away, stating that he would have to see Hudson about it. A second interview was had, also in the presence of the detectives, when Hopp pretended that Hudson would not settle the case except in the presence of his attorney, or a notary public. To this Pickford replied that he did not care to have an attorney in the matter, and told Hopp to see Hudson again and report the very best he could do. On Hopp's return for the third interview, he opened the conversation by saying: "Pickford, you are up against it. This man won't settle for less than $11,500."

Thus it appears that Hopp was gradually feeling his way to the $11,000 which Talbott, about the same time, told Judge Henderson was the fee "we" expected to make out of the indictment and in connection with the insurance feature. it may well have been that Talbott, out in Rockville, kept in touch with Hudson and Hopp and was informed of the result of each interview immediately after it terminated.

With these connecting links it would have taken a jury but a short while to decide that there was an utter absence of good faith on the part of Talbott in procuring the indictment and that, in so doing, Talbott had been guilty of "an abuse of his official position and prostitution of his office" and "using his said office for his personal end and gain," as charged in the bill and alleged libel.

The manner in which the new evidence was obtained is a sufficient answer to the contention of the appellee Talbott that it might have been offered in evidence at the trial of the libel suit. Neither complainants nor their counsel had, or

possibly could have had, any reason to suspect that Talbott had at any time or place, or to any person, made the admission testified to by Judge Henderson; and Judge Henderson says that if he mentioned the matter to any one it was only to members of his bar, and in confidence, and that he would not have mentioned it to complainants' counsel if he had not supposed that the litigation was at an end (R., p. 95).

IV.

ARGUMENT ON THE LAW.

The propositions involved in the first five assignments of error are so closely allied they will be discussed together in the brief.

These assignments are as follows:

The court below erred:

(1) In holding that whether the appellants had made diligent efforts to discover evidence to support a defense of the truth of the said charges which proved futile and had in consequence been advised by their counsel that to plead justification without proof in support of the plea would possibly prejudice their case through probable aggravation of the damages was a fact in issue.

(2) In holding that the failure to discover evidence of the truth of the libelous charges and plead the same by way of defense was through the fault or failure of diligence of the appellants.

(3) In holding that the evidence of the witness Henderson was not so certain and conclusive that it would without reasonable doubt have determined the action for libel in the appellants' favor could it have been made available on the trial.

(4) In not holding that had the said evidence been before the jury on the trial a different verdict would necessarily have been the result.

(5) In not giving due consideration and weight to the said evidence.

The court below says in its opinion (R., pp. 162-163):

> "It was incumbent upon the plaintiffs to prove, as well as allege, that the failure to discover evidence of the truth of the libelous charges, and plead the same by way of defense, was not through their own fault or negligence. In our opinion they have not discharged this obligation." * * *
>
> "The bill for injunction alleges as the reason for the failure so to plead, that the parties had made diligent efforts to discover evidence to support such a defense, which proved futile, and had, in consequence, been advised by their counsel that to plead justification without some proof in support of the plea would possibly prejudice their case through a probable aggravation of the damages. *This was a fact in issue, and constitutes an essential foundation for the relief sought.* (The italics are ours.) A careful examination of the record discloses no evidence whatever in support of the allegation. * * * Neither Pickford nor his leading counsel in the action for libel who were witnesses testified to a single fact tending to show that there had been any effort to discover evidence of the truth of the charges or any advice not to plead justification because of the failure to discover evidence to support it."

The tenth paragraph of the original bill filed by appellants and verified by their oaths (R., p. 4) avers, *inter alia*, that—

> "At the time of the filing of said declaration (in the libel case), the complainants verily believed it to be true that the said defendant Talbott had, in fact, caused the said indictment to be procured against

them, the complainants, in the hope and with the purpose aforesaid, and so informed their counsel in the said cause before the filing of their pleas to the said declaration therein, but the complainants were advised by their counsel that, should they, the complainants, attempt, in and by their said pleas, to justify the publication of the said article by pleading the truth thereof, and yet fail to make good such plea by evidence to the satisfaction of the court and jury to try the said cause, the said attempt at justification would be held to be a repetition and republication of the said libel, and would, accordingly aggravate the damages possibly to be recovered in the said cause; and the complainants were, on the other hand, advised by their said counsel that if they, the complainants, should plead not guilty generally to the said declaration, they would, in all probability, be excluded from endeavoring to prove the truth of the said article and alleged libel to the effect aforesaid; and the complainants, principally because of the secret nature of the supposed and believed conduct of the said defendant in the premises, being unable, after due diligence in that behalf, to procure and submit to their said counsel, evidence which, in the opinion of counsel, might properly and safely be offered before the court and jury on the trial of the said cause at law, in justification of the said article and alleged libel and in proof of the truth thereof, were compelled to confine, and confined, their defense in the said cause to the general issue, and were thereby deprived of the right and opportunity to offer evidence tending to prove the truth of the defense aforesaid."

These clear, distinct, and unequivocal averments of fact met with no denial in the answer to the bill filed by appellee (R., p. 17). Nor were they made the subject by him of a demand for strict proof, which demand is not infrequently interspersed among the other paragraphs of his answer.

With these distinct averments of fact made under oath in the bill and not denied in the answer, can it be properly

said that the facts were in *issue?*. What necessity or even occasion was there to submit proof of uncontroverted facts? Do uncontroverted facts create an issue? To have taken testimony in regard to such facts would have been a needless expenditure of time and money, resulting only in encumbering the record.

This brings us to a consideration of the holding of the lower court that the failure to discover evidence of the truth of the libelous charges and plead the same by way of defense was through the fault or failure of diligence of appellants.

The very nature and character of the proof ultimately secured, in conjunction with the source thereof, and the manner in which it was obtained, would in itself seem to be a complete answer to the charge.

In determining what is due diligence the court should not look to what an abnormal person, possessed of some unusual and hidden faculties for discovering evidence would do, but rather to what a man of ordinary prudence would do. What man of ordinary intelligence, or extraordinary intelligence for that matter, would think of going to a judge holding the position that Judge Henderson held, and asking him if the prosecuting attorney, charged with the duty of maintaining the law and prosecuting its offenders before the court over which such judge presided, had admitted to him that while engaged in the discharge of his public duties in prosecuting men upon a criminal charge of arson or statutory burning, he was at the same time representing the insurance companies that paid the insurance,—

> "And that if the defendants were convicted, it was probable the companies would recover the money that they had paid after the fire; that a large fee was involved in the matter; * * * and that in the event of success in the recovery, the fee would amount to about $11,000"? (R., p. 94).

Imagine the defendants at the bar, as these appellants were, charged with this serious offense making any such inquiries of the presiding judge! Certainly they could not have done so without first casting prudence to the winds.

Assuming for the moment that the circumstances warranted their taking such action, would they have elicited the desired information?

Judge Henderson testified that he might have mentioned the matter to one or two members of his bar, but that if he did he told them under an injunction of secrecy; that he did not otherwise mention it to any one except Mr. Henry E. Davis, of counsel for appellants. This was Christmas Day, 1908. He had gone out for a walk in the evening and had walked as far as the railroad station at Rockville, Md. He accidentally met Mr. Davis on the platform. For want of something else to talk about he asked if the judgment in the case had been paid and was informed that it had not, owing to some question having arisen about the division of the judgment. Thereupon he told Mr. Davis of the conversation that had taken place between Talbott and himself. He further testified:

> "I supposed at that time the litigation in the matter was at an end, or I should never have mentioned the matter to Mr. Davis" (R., pp. 95-97).

Thus the record discloses it would have been a futile thing for the appellants to have sought the proof of Talbott's guilt from Judge Henderson.

The court below, while expressly refraining from saying that the testimony of Judge Henderson "is not to be believed," says that it would seem improbable that Talbott would make to Judge Henderson the statements attributed to him and testified to by Judge Henderson.

Because of the lapse of time between the time when the statements were made and Judge Henderson testified, the court holds that it cannot concur in the judgment of the

trial court that had the testimony of Judge Henderson been offered before the jury a different result would have followed.

In thus holding the court below overlooks the many facts that would have most strongly corroborated the testimony of Judge Henderson, and the fact that his testimony was the missing link in the chain of evidence to demonstrate that Talbott was guilty of abuse of his official position and prostitution of his office, for the purpose and in the hope, through the criminal proceedings instituted by him against appellants, of obtaining from the insurance companies large sums of money, and, in effect, using his office for his personal end and gain. This was the gravamen of the charge in the libel suit (R., p. 4).

We will not undertake to review all of the facts which would have corroborated the testimony of Judge Henderson—they are fully discussed in the brief elsewhere, under the argument on the facts. But at this point we cannot refrain from inviting the court's attention to such facts as contained in the 11th paragraph of the original bill filed in this cause (R., p. 5) and not denied in the answer of appellee (R., p. 17).

For the convenience of the court we here reproduce paragraph eleven of the original bill:

> "11. At the said trial of the said cause numbered 45,662, at law, however, under the ruling of the justice presiding that the same might be shown, not in justification of the said alleged libel or to prove the truth thereof, but to indicate the absence of malice on the part of the complainants and to mitigate the damages possibly to be recovered in the said cause, the complainants offered and gave in evidence the following matters and things, all of which were shown to have been known by and to the complainants at and before the composition and publication of the said alleged libel, namely: All the matters and things hereinbefore in the fourth, fifth, sixth, seventh and eighth paragraphs of this bill set forth and

alleged, and the following facts and circumstances:

"At the time of the burning of the improvements aforesaid, to wit, in the month of September, 1897, the complainant Pickford was extensively engaged in the grocery business at the corner of Ninth street and Louisiana avenue, northwest, in the city of Washington, District of Columbia. In November, 1900, the said complainant made the acquaintance of one Hopp, a resident of the said District, who became, and was, a customer of the said complainant at his said place of business and had a small line of credit thereat. To wit, three weeks, after the said complainant became acquainted with the said Hopp, he, the said Hopp, came to the said complainant and asked if he, the said complainant, was 'in trouble about a fire in Maryland,' to which said complainant replied that he had had some trouble with insurance companies but that the matter had been settled out of court; whereupon the said Hopp stated that the said Hudson, aforesaid, and the prosecuting attorney of Montgomery county, Maryland, meaning the defendant, Henry M. Talbott, were trying to get evidence tending to show that the complainants were guilty of causing, or procuring, the destruction by fire of the improvements aforesaid, and he, the said Hopp, further said to the said complainant 'for a small matter of five hundred dollars I can fix it for you'; and to this the said complainant replied that he would not be blackmailed. Subsequently, and, to wit, about the first day of February, 1901, the said Hopp came to the place of business of the said complainant and showed him, the said complainant, a cheque from the said defendant, Talbott, or the firm of which he was a member, for the sum of seventy-five dollars ($75), which the said Hopp then and there stated that he had received from the said Hudson and that the same had been sent to the said Hudson as part of the money which the said defendant, Talbott, was willing to pay to get evidence to convict the said complainant, Pickford, under the indictment then pending at the town of Rockville, as aforesaid; whereupon, the said complainant, Pickford, stopped the credit of the said Hopp at his, the said

complainant's, place of business, and had nothing further to do with him, the said Hopp. In the following month, to wit, in the month of March, 1901, the complainants were indicted, as aforesaid, and there followed upon the indictment of the said complainants the acts and proceedings hereinbefore set forth. Upon the return of the complainant, Pickford, from the said town of Rockville, where, as aforesaid, he had gone to answer to the said indictment, and, on the afternoon of the same day, the said complainant was informed by one of his clerks that the said Hopp had called at the said complainant's place of business wanting to see him, the complainant. Subsequently, the said complainant met the said Hopp, who told the said complainant 'that the matter could be settled yet, but it would take a little more money,' and said complainant, suspecting a further attempt at blackmail, consulted the United States attorney in and for the District of Columbia and the chief of the detectives of the said District, and laid before them the circumstances of the case as then existing and known to him, the said complainant, and, under the direction of the said officials, detectives were detailed by the said chief to work on the case and were present, concealed behind a screen, in a room where subsequent interviews were had by the said complainant and the said Hopp, and every such interview was had in the presence of such detectives, who advised the meetings and saw and heard all that was done or said thereat. At the first of the said interviews the said complainant stated to the said Hopp that he, the said complainant, was sorry that he had not settled the case for five hundred dollars when he could have done so, and the said Hopp replied that it would have been better to settle in that way; whereupon the said complainant inquired of the said Hopp whether the sum of twenty-five hundred dollars ($2,500) would settle the case, and, upon the said Hopp's stating in reply that he did not know but would have to see the said Hudson, said interview terminated. At a second interview, the said Hopp stated to the complainant that the said Hudson declined to settle except in the presence of

a notary public or his, the said Hudson's, attorney; and the said complainant manifested an anxiety to settle the matter and told the said Hopp to do the very best he could, but no definite offer was made; and, at the conclusion of the said interview, a further interview on the following day was agreed upon. At the said third interview, the said Hopp opened the conversation by saying to the said complainant, 'Pickford, you are up against it; this man will not settle for less than eleven thousand, five hundred dollars ($11,500).' The said complainant pretended to assent to the said terms, and arrangements were then and there made for the payment of the amount of money so demanded; the sum of two hundred dollars in cash in marked bills was handed to the said Hopp on account, and the said complainant gave to the said Hopp his, the said complainant's, promissory note to the order of the said Hopp, for three thousand dollars, and further arrangements were made looking to the payment at a subsequent time, and later in the same day, of the balance of the said sum so demanded. Thereupon the said Hopp left the said complainant's place of business, followed by the said detectives, and went to his, the said Hopp's, own place of business on the south side of Pennsylvania avenue, near Seventh street, northwest, in the city of Washington, and, when he, the said Hopp, arrived there, the said Hudson was waiting for him, and they, the said Hopp and the said Hudson, were both arrested by the said detectives, without suggestion or request in that behalf from the said complainant. Several hours later, on the same day, the said complainant, being at his place of business, received a telephone message from the chief of detectives of the District of Columbia requesting him, the said complainant, to come to police headquarters, which the said complainant did, and was there told by the said detectives, or one of them, that the said Hopp and the said Hudson 'had practically admitted their guilt,' and that Hudson 'had confessed that he was in a bad fix.' Upon the suggestion of the said chief of detectives, the said complainant then went to the police court of the said District of Columbia

and swore out a warrant charging the said Hopp and the said Hudson with conspiracy in an attempt at blackmail. When the hearing on the said charge was on in the said police court, the defendant, Henry M. Talbott, was present, showing a keen interest in the proceedings, and having, as he himself testified on the trial of the said cause numbered 45,662, come down from his home in the said town of Rockville to the said city of Washington to hear the said trial. Several days after the said hearing, the said complainant, Pickford, sued the said Hopp on a promissory note for the sum of two hundred and fifty dollars, before Charles S. Bundy, Esquire, a justice of the peace in and for the said District of Columbia, then having his office in the basement of the Fendall building, at the corner of D street and John Marshall Place, in the said city of Washington, and, at the trial of the said cause, the said Hudson appeared as a witness for the said Hopp. While the said trial was in progress, the said defendant, Henry M. Talbott, was standing on the street just outside of the office of the said justice of the peace, and several times called the said Hudson out of the room where the said trial was being had and talked with him in a very excited fashion, although the said defendant did not actually enter the court-room of the said justice of the peace. While under cross-examination on the said trial, said Hudson was asked, and testified, as follows:

"'Q. You never told me just what you stated to the insurance company.

"'A. Now, judge, had I better tell that? That will tend to incriminate me in the case in Maryland.

"'Q. You are not indicted in Maryland?

"'A. No, but I may be. I anticipate indictment in Maryland because I was informed by Mr. Talbott, the prosecuting attorney, that, as I had some knowledge, unless I made a full statement to him, he would consider me *particeps criminis* in the case. Before that I had appeared before the grand jury, made my statement, and the indictment was found. I did not know Mr. Pickford at the time.'"

In this connection the statement of Hopp (the emissary of Hudson, who had been co-operating with Talbott in the procurement of the indictment and on whose testimony alone the indictment was found) in his third interview with appellant Pickford, while the two detectives were behind the screen, is all convincing. He said, "Pickford, you are up against it; this man will not settle for less than eleven thousand five hundred dollars" (R., p. 7). *Almost the identical amount that Talbott, at almost the identical moment, told Judge Henderson "we" were to get from the insurance companies in the event of a conviction* (R., p. 94).

These facts, in conjunction with the testimony of Judge Henderson, remove all possible doubt of the truth of the charge that Talbott was guilty of moral turpitude in the conduct of his office of prosecuting attorney, and that he was prostituting his office for his own personal gain.

All these facts duly considered in the light of the holding of this court in Stitt *vs.* Huidekoper, *supra*, would, we respectfully submit, have resulted in the jury finding a verdict directly opposite to the one it did find.

The trial court in its opinion in this case, in part, says (R., pp. 153-154):

> "Counsel for the complainants could not reasonably have anticipated the finding of any such evidence as that of Judge Henderson before or during the trial of the suit at law, and therefore I am not disposed to hold the complainants responsible for negligence in any way in not pleading the truth of the facts stated in the said libel in the said law suit.
>
> "The testimony accidentally discovered after the said judgment had been affirmed by the Supreme Court of the United States, places an entirely different face upon the case. If that testimony had been before the jury with the same strength that it has been presented now, added to the testimony already in the case, it would, in my judgment, have changed the result of that verdict, and produced a verdict for the defendants."

The 6th, 7th, and 8th assignments of error all relate to errors committed by the court of appeals in not affirming the decree of the Supreme Court of the District of Columbia, granting a perpetual injunction enjoining the collection of the judgment, and will therefore be discussed together.

These assignments are as follows:

(6.) In not affirming the decree of the Supreme Court of the District of Columbia.

(7.) In reversing the decree of the Supreme Court of the District of Columbia.

(8.) In directing that the bill of complaint be dismissed.

With characteristic simplicity, clearness, and force Chief Justice Marshall stated the rule governing cases like the present in the following words:

> "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment and of which the injured party could not have availed himself in the court of law, or of which he might have availed himself at law and was prevented by fraud or accident, unmixed with any fraud or negligence within himself, will justify an application to a court of chancery."
>
> Marine Ins. Co. *vs.* Hodgson, 7 Cranch, 336.

The gist of the rule so established is that where a defendant is "prevented by fraud or accident unmixed with any fault or negligence in himself" from availing himself of a proper defense, he will be justified in applying to a court of chancery for relief.

As has been pointed out, fraud and attempted blackmail were clearly indicated in the conduct of Hopp and Hudson prior to the finding of the indictment. Immediately after the indictment had been found Hopp, as an emissary of Hudson, again began to make demands on Pickford, all in the presence of detectives who testified in the case, until finally the sum demanded was $11,500. Although Talbott had procured the indictment of Pickford on the unsupported testimony of Hudson, there was no possible way of definitely connecting him at that time with the efforts of Hopp and Hudson. After this court had affirmed the judgment in the libel suit and its mandate had gone down, by an accident, almost providential, the connecting link was found in the statement about the $11,000 fee made by Talbott to Judge Henderson almost at the very moment that Hopp and Hudson were prosecuting their demands on Pickford here in Washington for a like amount.

There is, after all, nothing definitely incriminating in what Talbott told Judge Henderson at the time, and nothing which, standing alone, could have formed the basis of proceedings in contempt of court or for impeachment, though it strongly suggested gross impropriety on the part of the Commonwealth's Attorney. It is only when this statement or admission to Judge Henderson is brought into relation with the contemporaneous acts and efforts of Hopp and Hudson to extort $11,000 from Pickford for procuring the indictment at Rockville to be quashed that guilt is established. So strong an impression did the statement have on Judge Henderson's mind that when Talbott subsequently recovered a verdict in the libel suit for $8,500, long after Talbott's term as Commonwealth's Attorney had expired, that he recalled the conversation, and "was impressed by the fact that Talbott had in his suit against Pickford recovered a sum which was substantially equivalent to what his fee might have been had he recovered the claims for the insurance companies" (R., p. 97).

As early as Lord Hardwicke's time (1745) the rule was established and clearly stated in—

Williams *vs.* Lee, 3 Atkyns, 223.

Lord Hardwicke, in pronouncing judgment in that case, says:

> "As to relieving against verdicts, for being contrary to equity, those cases are, where the plaintiff knew the fact of his own knowledge to be otherwise than what the jury find by their verdict, and the defendant was ignorant of it at the trial; as where the plaintiff's action might be for a debt, &c., and the defendant after the verdict discovers a receipt for the very demand in the action, here the court would relieve."

In

Ocean Ins. Co. *vs.* Fields, 2 Story, 72,

the bill charged that the judgment recovered on the policy of insurance was procured by fraud and that the loss of the vessel upon which the insurance had been placed was occasioned by the fraud of the defendant in fraudulently casting away the vessel and in fraudulently boring holes in her bottom. The bill avers that at the time of trial the insurance company did not know of these fraudulent practices and discovered them after the verdict. It was contended in the case, on the part of the defendant, that, at the time of the trial, the insurance company impliedly admitted that they knew that the vessel had fraudulently disappeared, but had since discovered the manner in which it was done, namely, by boring holes in the bottom.

In sustaining the jurisdiction of equity to enjoin execution on this judgment the court say:

> "It would be a monstrous doctrine to assert that any person claiming a right of action founded upon his own fraud and felony could avail himself of it and thus by his own turpitude exclude the other party

from a perfect defense to the action: To such a case the maxim of retributive justice is most properly addressed—'*Allegans suam turpitidinem non est audiendus.*'

"Now the very reason upon which the present bill is filed that this, a perfect and valid defense at law, was, by the fraudulent concealment of the defendant and the total ignorance of the plaintiff of the facts, incapable of being set up in the original action, and the recovery was therefore inequitable and iniquitous."

See also:

Gardiner *vs.* Hadley, 12 Gill. & J., 365.
Fitch *vs.* Polk, 7 Blatchford, 564.
Reed *vs.* Harvey, 23 Arkansas, 44.
Iglehart *vs.* Lee, 4 Md. Ch., 514.

In

Taylor *vs.* Railroad Co., 86 Tenn., 228,

it appeared that in July, 1878, one Taylor recovered a judgment against the city of Nashville on four bonds of $1,000 each, part of an issue of $500,000. On the 21st of August, following, the judgment was assigned to the Third National bank. Execution had issued and *nulla bona* returned before the assignment. The bill was filed against the railroad company for whose benefit the bonds had been issued by the city. The city of Nashville intervened as a party and filed a cross-bill which sought to perpetually enjoin collection of the judgment on the ground that it was procured by fraud and was therefore void. The fraud alleged that the four bonds had been stolen from the court record where they had been made the basis of a judgment in behalf of an insurance company, the rightful owner.

The bank claimed that this was a legal defense available when the judgment was taken, and that the judgment was not wholly without negligence on the part of the city in not

resisting the entry of judgment on bonds that had already been reduced to judgment.

A perpetual injunction was issued and affirmed on appeal.

In

Powers *vs.* Butler, 4 N. J. Equity, 465, 471,

the court thus comprehensively and clearly states the rule:

> "If therefore it shall appear that the facts charged rendered it inequitable in the plaintiff at law to enforce his judgment, and that those facts could not avail the defendant there, by reason of the rigid rules of law, or by fraud or accident, or by reason of their being unknown to him in time for that purpose, without any fraud or negligence on his part, then the plaintiff must be restrained; otherwise, not."

The latest case on the general subject considered by this court is

Fidelity Mut. Life Ins. Ass'n *vs.* Clark, 203 U. S., 64.

In this case it appeared that one William A. Hunter on the 28th day of October, 1896, at Dallas, Tex., procured three policies of insurance on his life for $5,000, each payable to his sister, Jennie M. Mettler (subsequently married to one Smythe). On the 3d of December following Hunter left his sister's home, announcing his intention of going into another county of Texas to make proof of a section of land which he had occupied for three years. He left with a wagon, two horses, camping outfit, &c., and said he would return in ten days or so. Shortly before going he handed a lawyer a sealed envelope which he requested the lawyer to keep. In this package were the three policies of insurance.

Mrs. Mettler, not hearing from her brother for fifteen days, went to inquire if he had arrived, and learning that he had not, a searching party went out, followed the trail of the wagon, and found where Hunter had camped on the banks of the Pecos river. Remains of his outfit were found; one horse was lying dead. It had been tied to a mesquite

bush with an inch rope and had struggled to get to the hay but could not reach it. There were signs of the other horse, which was elsewhere seen wandering about with a rope on its neck. Footprints, identified by Mrs. Mettler as those of her brother, were found leading to the river, but not returning. Some of the footprints were at the edge of the river. There were marks of the slipping of one of the feet, and a broken mesquite root on the bank.

There was some evidence as to quicksands in the river; its depth, rapidity and dangerous character.

In January following, Mrs. Mettler presented an affidavit in due form to the insurance company, stating that her brother had been drowned in the Pecos river on or about the 4th of December, 1896, and demanded that the defendant pay to her the sum of $15,000. This being refused suit was entered on the policies in December, 1898, in the State court, but it was afterwards moved into the Federal court.

The insurance company resisted payment of the policies, mainly on the ground that there was not sufficient proof of death, but, acting under the instruction of court, the jury found for the plaintiff in the full amount claimed. The case was subsequently brought by appeal to this court and is reported in 185 U. S., 308. The judgment was affirmed on the 31st of January, 1902, and the amount of the judgment, with interest and attorneys' fees, as provided by the laws of Texas, amounting to $24,028.25, was deposited in the registry of the court on the 3d day of June, 1902.

On the 27th day of April, 1903, ten months after the judgment had been rendered, affirmed, fully discharged and paid, Hunter was found living under an assumed name in the State of Alabama. Within a month thereafter the insurance company brought suit in the Supreme Court for the Northern District of Texas, charging that the judgment against it was obtained by fraud and conspiracy between Mrs. Mettler and her brother, and praying that Mrs. Mettler might be enjoined and restrained from "in any way making

use of the judgment," and that she might be required to repay to the insurance company the amount of $11,616, which, it seems, was the part of the money actually received by her. The attorneys who had received fees, under agreements with Mrs. Mettler, and also certain fees in the case under the laws of the State, were made parties to the bill, which also prayed that the moneys received by them should be repaid. Final decree was entered in the case restraining Mrs. Mettler as prayed in the bill, and decreeing that she should repay to the insurance company the amount she had received, together with interest thereon. The decree denied relief prayed against counsel in the case.

Mrs. Mettler, who by that time had married again, did not appeal, but the insurance company did appeal from so much of the decree as denied the relief against the counsel in the case prayed in the bill. This appeal came on to be heard in this court in 1906, under the title, Fidelity Mutual Life Insurance Company against Clark, and was affirmed upon the ground that fraud "gives rise only to a personal claim" (p. 73), and that there could be no such claim against the counsel in the absence of proof that they had notice of the fact that the judgment was obtained by fraud.

The court of appeals relies in part on

Mayor, etc., N. Y. *vs.* Brady, 115 N. Y., 599;

In this case the city of New York undertook, by bill in equity, to enjoin judgments recovered by the defendant Brady for work done under contracts with the city. The charge was that there had been fraud as well in the procurement of the contracts as in the performance thereof. But the court, in discussing the case at great length, held that the charges of fraud against the contractor were not "well founded" (p. 612). *Non constat* that if the charge of fraud had been well founded the relief sought would not have been granted.

The brief for the appellee throughout erroneously assumes that the ground on which the complainants seek relief is fraud in the procurement of the judgment complained of.

The bill makes no averment whatever as to any fraud on the part of the appellee, plaintiff in the law suit, in procuring the judgment in question: the ground on which relief is prayed is accident, as distinguished from fraud.

As respects relief against a judgment, fraud, within the meaning of equity, means a wrongful act, positive or negative, including any form of artifice, done or practiced by the prevailing party, which either of itself was efficient in the procuring of the judgment, or else induced the unsuccessful party to do, or to abstain from doing something, the doing or abstaining from which by him led to the judgment. In other words, fraud, in the respect under consideration, is predicated only of an act, positive or negative, committed by the prevailing party; it has, and can have, no application to the case of an omission by the unsuccessful party, through ignorance, to do in the cause what, but for such ignorance, he might and would have done, unless, and unless only, the ignorance occasioning the omission was caused by the concealment by the prevailing party of something which, but for such concealment, would have prevented the ignorance of his adversary in the particular concerned.

As distinguished from fraud, *accident*, within the meaning of equity, is a wholly different thing, and is not easily to be defined, largely for the reason that, as in the case of fraud in general, equity hesitates to hamper itself by a definition of a head of its jurisdiction so varying, elastic and salutary.

As has been well said:

> "Some writers on equity jurisprudence have not attempted to define the term 'accident' in its equi-

table signification; others have made the attempt, with more or less success; all of them confess to the difficulty of arriving at a definition which will at once embrace all the elements requisite to the equitable idea and exclude all others. Nevertheless the following, by a modern author, appears to be both comprehensive and accurate: 'Accident is an unforeseen and unexpected event, occurring external to the party affected by it, *and of which his own agency is not the proximate cause*, whereby, contrary to his own contention and wish, he loses some legal right, or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain.'" Note 2, 1 Encyc. Law, 2d edition, 277.

Pomeroy's Equity Jurisprudence, sec. 836.

And, as has been equally well said, "every attempt to define 'accident' in its judicial acceptation, even in modern times, has failed."

Note 2, 1 Encyc. Law, 2d edition, 277.

And see *idem*, page 278, and notes.

And a good definition is indicated in the statement that the word ordinarily imports something outside of a party's own control, or at least something which a reasonably prudent man would not be expected to guard against or to provide for.

Pickering *vs.* Cassidy, 93 Me., 139.

Another definition is that "though not necessarily synonymous with 'surprise' when used as a ground for a new trial, 'accident' has substantially the same meaning in legal practice, as each is used to denote some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any fault or neglect of his own, which ordinary prudence could not have guarded against.

McGuire *vs.* Drew, 83 Cal., 229.

Zimmerer *vs.* Fremont National Bank, 59 Neb., 661.

Under these attempted definitions, and regard being had to the signification which it is the aim of equity to give to the word, it may be confidently submitted that the omission, through ignorance, to do that which might and would have been done, and the not doing which has placed a party in a condition or situation to his injury, is an "accident;" provided, of course, that the ignorance be unaccompanied by negligence—by which is meant only the failure to do that which a reasonably prudent man would be expected to do or to provide for.

The distinction thus clearly existing between "fraud" and "accident" is further referred to in the consideration of the authorities hereinafter appearing.

The accident relied on is clearly such within the contemplation of the law.

What may properly be termed the appellant's admission of his motive in procuring the indictment in question was made to a judge of whose court the appellant was an officer, and the judge kept the matter within his own breast, unless, as he says, he might have mentioned the matter to one or two members of his bar, but if he did so, he says that he "told them to say nothing about it" (R., p. 95), and that he mentioned it, if at all, "with the injunction of secrecy" (R., p. 98).

It surely requires no discussion to support or to enforce the proposition that no man of prudence, whether ordinary or extraordinary, could possibly be expected to assume or suppose that a prosecuting attorney would proclaim his turpitude to the judge before whom he was required to discharge his duty, and which judge was, indeed, his colleague in the discharge of that duty.

Against this simple and conclusive proposition it is contended, with apparent seriousness, that it was negligence in complainants, or their counsel, not to have asked a judge

whether a State's Attorney, prosecuting a case in his court, had exhibited to him, the judge, any lack of good faith in the matter of the prosecution. The unaffected surprise, not to say resentment, with which such an approach to a judge would be met may more easily be imagined than described; and the contention is not worthy to be dignified by further consideration.

The cases relied on by appellee in his brief are readily distinguishable from the foregoing, and the principle which they illustrate and apply.

Maryland Steel Co. *vs.* Marney, 91 Md., 360,

was a suit in equity to restrain execution of a judgment rendered in a personal injury case, on the ground that the judgment was obtained on false testimony. An injunction was denied because the question as to the truth or falsity of the testimony so attacked was directly in issue at the trial and was therein passed upon by the jury.

This case aptly illustrates the oft-mentioned distinction between intrinsic and extrinsic fraud, being an example of the former.

In

Pico *vs.* Cohn, 91 Cal., 129,

Pico owned lands in Los Angeles, California, of great value, which were mortgaged for a considerable sum. To prevent their sacrifice under foreclosure proceedings he obtained a loan from Cohn, giving Cohn as security a mortgage, in form an absolute grant of the encumbered property. Shortly thereafter Pico procured the necessary funds, tendered Cohn the amount of his loan with interest, and demanded reconveyance, which was refused, Cohn contending that the transaction was not a loan but an absolute grant. Thereupon Pico brought suit to compel reconveyance.

In the conduct of the negotiations with Cohn the only person present was one Johnson, who knew all that took

place, and that the real transaction was a loan and security and not a purchase and conveyance absolute. Shortly after the execution of the deed, Johnson had so stated in the presence of Pico's attorneys and numerous other persons. Johnson was, therefore, called as a witness in behalf of Pico. Contrary to the expectations of Pico's attorneys, and to the fact, Johnson testified that it was a sale and absolute conveyance; but in spite of his testimony the court found for the plaintiff. A new trial was awarded. Before the cause came on for second trial Johnson died, but his testimony, as given at the first trial, had been reduced to writing and preserved. Pico's counsel knew that this testimony was false in its general statement that the conveyance to Cohn was absolute, and they suspected that Cohn had bribed the witness to so testify. On the second trial, the contention of Cohn that the deed was an absolute conveyance, as corroborated by Johnson's deposition, prevailed and there was a judgment for the defendant.

Some time after final judgment plaintiff discovered indubitable proof that Cohn had paid Johnson $2,000 to testify falsely, and that on the morning the testimony had been given Cohn had placed that amount with one Ford to be given to Johnson if he testified to an absolute sale. This he did, and after the trial the money was handed to Johnson. This claim of subornation of perjury was relied upon in the suit afterwards brought by Pico to set aside the decree in the former case. The relief was denied for the following reasons:

> "That a former judgment or decree may be set aside or annulled for some frauds there can be no question, but it must be a fraud extrinsic or collateral to the questions examined and determined in the action, and we think it is settled beyond controversy that the decree will not be vacated, merely because it was obtained by forged documents or perjured testimony. The reason of this rule is that there must be an end of litigation, and when parties

> have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means of reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed on, or that the prevailing party by some extrinsic or collateral fraud was prevented a fair submission of the controversy. What then is an extrinsic or collateral fraud within the meaning of this rule? * * *"
>
> "But counsel seek to distinguish this case from those in which it has been held that a judgment will not be set aside by reason of it being based upon forged documents or perjured testimony. They say that the fraud committed by Cohn was the bribing of Johnson, that this was collateral and extrinsic; that it was not and would not have been the subject of investigation at the trial of the original action. We do not think this distinction can be maintained. The fraud which Cohn committed was the production of perjured evidence in support of his defense. The means by which he induced the witness to swear falsely was but an incident."

This case admirably expounds the doctrine of extrinsic, as distinguished from intrinsic, fraud.

In

United States *vs.* Throckmorton, 98 U. S., 61,

it appeared that in pursuance of a treaty with Mexico the United States created a special tribunal, a board of commissioners, to which all holders of Spanish or Mexican land grants in California were required to submit their titles for confirmation and patent. From this board of commissioners appeals might be taken to the district court, acting under special authority and trying the cases *de novo,* and thence to this court. The decisions of the tribunals so constituted were declared to be final.

The Throckmorton case was one of three companion cases, heard together in the circuit court and reported there

under the name of United States *vs.* Flint, 4 Sawyer, 42. They involved thousands of acres of land, and their pendency indirectly cast a cloud upon the title of a large portion of California. Some or all of the original claimants were dead, and the lands had passed into the hands of others who had made valuable improvements thereon.

The suits, though brought in the name of the United States, were not instituted by the Attorney General, as they should have been, but by the District Attorney, and apparently at the instigation of speculators. This fact alone was held to be sufficient ground for their dismissal. There was, besides, a doubt as to the jurisdiction of the court to review the proceedings of the special tribunals. Such was the general atmosphere of the cases.

The suits were brought in the circuit court to cancel patents issued by the United States to the claimants, and to set aside the decrees of confirmation rendered by the commissioners and the district court. In the Throckmorton case the petition for confirmation was filed with the commissioners in 1852. The decree of confirmation was rendered in 1853, and affirmed by the district court in 1856, and the appeal of this court was dismissed by the Attorney General in 1857. The bill to set aside the decree was filed in 1876, more than twenty years after its affirmance by the district court.

The gravamen of the bill was that the written grant filed in the case had been fraudulently executed after the petition for confirmation was filed, and antedated so as to appear to have been made at the proper time, and supported by perjured depositions. This written instrument appears to have been like other deeds, *not merely evidence of a conveyance, but the conveyance itself.* The only question controverted before the commissioners and the district court was the genuineness and validity of this grant, and the Government's law agent seems to have had notice from papers in another case that it was fraudulent. The original

archives were at all times in the possession of the United States, and the grant itself was on file in the suit for more than four years before the final decree of the district court was rendered. The bill did not set up any newly discovered evidence and excuse its late production, but rested upon the bald assertion that the grant was fraudulent and supported by perjury.

The opinion of the circuit court was delivered by Mr. Justice Field. In the concurring opinion Justice Hoffman uses the following very forceful language (pages 76 and 77):

> "It is in effect contended that where a party has been forced to commence a suit to establish the genuineness of a document, and the suit is tried on that issue, his adversary may omit to bring forward proofs of its fraudulent character which are in his own possession, and which by reasonable diligence he might have produced, and afterwards, when judgment has gone against him, may ask a court of equity to set aside that judgment and retry the same issue, not on the ground of newly discovered evidence which could not by reasonable diligence have been procured, nor on the ground of fraud practiced in the course of the proceedings, but on the allegation that the document adjudged to be genuine was in fact fraudulent, and that he believed in and was misled by the assertion of its genuineness made by his antagonist. And further, that this belief in the assertions of his adversary should excuse him for his laches in not producing proofs of the fraud in his own possession on the trial of the suit which he has himself compelled his adversary to bring to determine that very issue. A statement of this position is its own refutation."

Commenting on the case Mr. Justice Miller, who delivered the opinion of this court, says (pp. 64-65):

> "There is no question of the general doctrine that fraud vitiates the most solemn contracts, documents,

> and even judgments. There is also no question that many rights originally founded in fraud become—by lapse of time, by the difficulty of proving the fraud, and by the protection which the law throws around rights once established by formal judicial proceedings in tribunals established by law, according to the methods of law—no longer open to inquiry in the usual and ordinary methods. Of this class are judgments and decrees of a court deciding between parties before the court and subject to its jurisdiction, in a trial which has presented the claims of the parties, and where they have received the consideration of the court."

The reasons for this rule are admirably stated by the learned justice in the following paragraphs of his opinion, all predicated on the maxim *nemo debet bis vexari pro una et eadam causa:*

> "But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his opponent. * * *"

Further along the opinion, citing with approval an opinion of Chief Justice Shaw in 2 Gray, 361, continues:

> "We think these decisions establish the doctrine on which we decide the present case, namely, that the acts for which a court of equity will on account of fraud set aside or annul a judgment or decree, between the same parties, rendered by a court of competent jurisdiction, have relation to frauds, extrinsic or collateral, to the matter tried by the first court, and not to a fraud in the matter on which the decree was rendered."

Though the courts are loath to restrain execution on a judgment at law on the ground that it was obtained on

perjured testimony, the rule has been applied in cases where the alleged perjury was committed by a witness not a party to the cause. But the rule does not apply when the prevailing party procured the judgment by his own perjury, and in such case equity will relieve.

Stowel *vs.* Eldred, 26 Wis., 504,

was cited also and relied on by the appellee in the court below, but is omitted in his brief in this court because diametrically opposed to his contention.

This was an action brought in Wisconsin upon a judgment for $11,680.14, recovered in Illinois. The defendant Eldred answered that the judgment was fraudulently obtained as to $6,503.84, and "demanded" that for this sum the judgment should be enjoined. Under the practice in Wisconsin an answer must be given the same effect as a bill in equity to relieve against a judgment. A demurrer to the answer was interposed.

The principal ground of defense to the action, which seems to have been for rent reserved under a lease, was that no rent was payable after April 1, 1862, because one Scofield, a duly authorized agent of the plaintiffs, had accepted a surrender of the lease in the name of the plaintiffs, entered upon the premises and rented to other parties. These facts the defendant undertook to prove by one of the plaintiffs, but he testified positively that Scofield never had any authority to accept the surrender of the lease. At the time of the trial, defendant did not know and could not learn of the whereabouts of Scofield. Some years afterward Eldred heard that Scofield was in Chicago and went to see him. Eldred was then told by Scofield that he had been duly authorized to surrender the lease, and exhibited a letter from the plaintiffs authorizing him to make and execute a subsequent lease.

In its opinion the court says:

> "There can be no possible doubt that if the defendant had known the real facts, and had sufficient proof thereof he might have set up the surrender of the premises as a bar to plaintiffs' recovery of the subsequent rent. But this he did not know, and upon calling as his witness one of the plaintiffs, the only person present at the time cognizant of the facts, he was defeated through the turpitude and treachery of that witness. It seems to us that if these allegations of fraudulent concealment and false swearing were sustained, they constitute a sufficient ground for equitable relief against the judgment, to the extent sought to be enjoined" (p. 510).

It will be observed that the cases cited for the appellee all relate to fraud, which, as above indicated, is dealt with throughout the brief as the ground on which complainants are relying for relief. The cases cited do not, therefore, in the slightest degree, impeach the principle of the rule invoked; they merely serve to show the distinction between intrinsic and extrinsic fraud as affecting the application of the principle.

But in the case of accident there is no question of the intrinsic as contrasted with the extrinsic, and it may confidently be said that there can be no such thing as "intrinsic accident" for, by very force of its meaning, the word imports only that which is extrinsic.

To sum the matter up, then, we have a case in which a defense was not made only because, through excusable ignorance, the existence of the defense was unknown at the time of the trial of the case at law; that defense now appears and is abundantly established, and the language of the trial court, at the close of its opinion, that it would be inequitable and against conscience for the appellee to recover the amount of the judgment in question under the facts as now shown, states the only possible conclusion to which equity could come in the premises.

For these reasons we respectfully submit that the decree of the court below should be reversed and the decree of the Supreme Court of the District of Columbia affirmed.

HENRY E. DAVIS,
SAMUEL MADDOX,
H. PRESCOTT GATLEY,
Attorneys for Appellants.

25

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CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 512.

THOMAS H. PICKFORD AND JOHN H. WALTER,
APPELLANTS,

vs.

HENRY M. TALBOTT.

Comes now the appellee by his attorney and moves the court, under Rule 21, sections 3 and 5, to dismiss the appeal herein, on the ground that the brief of appellants has not been filed within the time limited by said rule.

JOHN RIDOUT,
Attorney for Appellee.

MESSRS. SAMUEL MADDOX, H. PRESCOTT GATLEY, and HENRY E. DAVIS, *Attorneys for Appellants:*

Please take notice that the above motion will be submitted to the court when the case is called for argument.

JOHN RIDOUT,
Attorney for Appellee.

APR 24 1912
JAMES H. MCKENNEY

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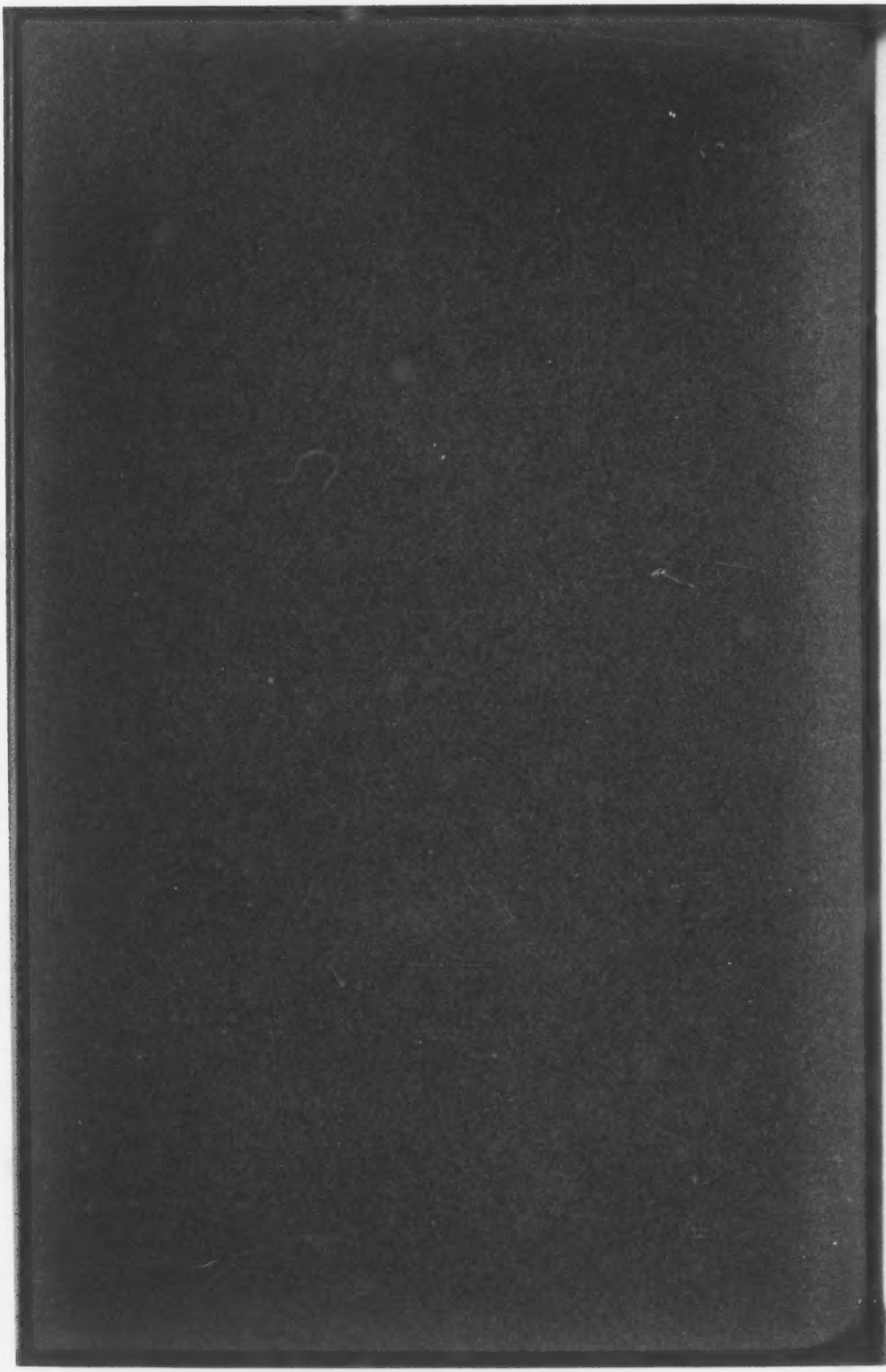
BRIEF FOR APPELLEE.

JOHN RIDOUT,
Attorney for Appellee.



IN THE

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BRIEF FOR APPELLEE.

The appellants have not yet filed their brief, and a motion to dismiss on that ground under Rule 21, sections 3 and 5, has been filed. Without waiving that motion, counsel for appellee respectfully submits the following brief on the merits:

Statement of the Case.

On the 30th day of March, 1906, the appellant recovered on the law side of the trial court, in an action for damages for libel, a judgment for $8,500 (Rec., pp. 9 and 10).

From this judgment an appeal was taken to the court below, where the judgment was affirmed (28 Appeals D. C., 498). Upon writ of error from the judgment of that court the judgment was affirmed by the Supreme Court of the United States (211 U. S., 199). The mandate of the Supreme Court was due to issue on the 30th day of December, 1908. On the 8th day of January, 1909, the bill in this cause was filed in the Supreme Court of the District of Columbia, in which it is averred in substance that the appellants believed that good grounds for a plea of justification existed, but being unable to obtain any evidence to sustain such a plea, they, acting under advice of counsel, pleaded the general issue. That at the trial of the libel suit they were not, by reason of the pleadings, allowed to prove the truth of the libel, by way of justification, and that by reason of their inability to plead and prove justification they were defeated, and a verdict was rendered against them as aforesaid; that on December 29, 1908, one of the counsel for appellees casually met one of the judges of the circuit court of Montgomery county, Maryland, where the criminal prosecution out of which the libel grew was instituted, and said judge then volunteered the statement that during the year 1901, when said indictment was pending, he had asked appellee why he kept the case open on the docket, to which the appellee replied in substance that he was keeping the case open because he had a large fee involved in a civil aspect of the case.

The bill further avers that had the fact of said conversation been known to appellants prior to the filing of their plea, they would have pleaded justification instead of the general issue; but, lacking such knowledge then, they refrained from pleading the general issue because they were further advised that if such plea of justification were filed, and did not prevail, the damages would be greatly increased (Rec., p. 5).

Before answering the bill and before the answer was due, appellee obtained and filed affidavits from the representatives of all the insurance companies negativing the charge

that appellee had an agreement with the said companies for collection of any money for them (Rec., pp. 21-27). Afterwards appellee filed an answer (Rec., pp. 15 to 21), wherein every material averment of the bill is denied and the reasons which impelled the appellants to plead as they did are pointed out; attention is called to the fact that two juries have refused to believe appellants' version, and to the further fact that if their averments as to the character of their real defense are true as stated in the bill, then it appears that, when in the trial of the libel suit they swore positively that they had nothing to do with the publication, they testified untruthfully.

It is also averred that there is no reason to believe that had the Maryland judge testified the result would have been different, because under the changed pleadings the true history of the fire at Four Corners, out of which the arson indictment grew, would have been elicited. The answer also shows that not only did appellee not obstruct appellants' inquiry, but, on the contrary, that at the trial of the libel suit he invited the fullest cross-examination. It is also shown that the appellants were negligent in not earlier inquiring of the Maryland judge, whom the answer points out was the one person likely to know if there had been bad faith on appellee's part.

And that inasmuch as the appellants had deliberately refrained from a given defense after careful consideration and conference because they had no confidence in and were afraid to risk it, appellee in nowise interfering with nor hindering them, and the natural source of information being obvious and easily accessible, it would be a grave departure from settled principles to permit a practical retrial of the case.

After filing the answer and affidavits appellee moved to dissolve the preliminary restraining order which had been granted (Rec., p. 21). This motion was denied. Appellants then amended their bill to meet such criticisms of the answer as counsel thought could be thus met (Rec., pp. 27-

31), one of the most interesting being that while the bill averred that the appellants "*could*" have availed themselves of the supposed new defense the amended bill avers that they "*would*" have done so.

Proof was then taken, and the insufficiency of the testimony of appellants will be hereinafter shown.

On final hearing in the trial court the injunction was made perpetual and appellee appealed to the court below.

The court below reversed the decree of the trial court and remanded the cause with directions to dismiss the bill (Rec., 165).

The cause is here on appeal from that decree.

ARGUMENT.

The record presents three questions, all of vital interest and importance:

1. Is not the exercise of the equitable jurisdiction sought to be invoked forbidden by article 7 of the amendments to the Constitution?

2. Do the facts proved make out a case for perpetual injunction against enforcing the judgment?

3. As matter of law, conceding the facts set up by the bills, has the court power to interfere with the collection of the judgment?

First.

Is not the relief sought by the appellants forbidden by the Constitution?

Article 7 of the amendments provides that—

> "no fact tried by a jury shall be otherwise examined in any court of the United States than according to the rules of the common law."

The application of this provision to the case at bar depends upon the real effect of the proceeding.

We submit that in its last analysis it is but an attempt to retry in equity the case already tried and finally disposed of at law, and that such a proceeding is within the spirit of the constitutional prohibition.

SECOND.

Does the proof warrant the decree?

The court will observe at the very outset that the crucial and pivotal averments of the bill are not even *attempted* to be proved.

The appellant Pickford did not testify except in rebuttal. Walter did not testify at all.

In their case-in-chief there was an utter failure to prove that any consultation ever took place in which it was decided that, for lack of proof, the general issue was the only available plea.

It is *affirmatively proved* that no inquiry was ever made of the Maryland judge as to his knowledge of the good faith or otherwise of the prosecution.

There is also affirmative proof that the appellants knew that they had procured the preparation and publication of the libel, and yet they both testified at the trial of the libel suit that they had no part either in its preparation or publication, and with this admission of untruthfulness on their lips they come into a court of equity with unclean hands, asking its aid.

And the only reason they give for such conduct is what they say in their bill, but do not prove, that they were afraid to plead justification because thereby the damages would have been greatly increased, as they surely would have been.

The appellants have the burden of proving by clear and convincing evidence the fraud they charge, for no court will in effect nullify a judgment any more than a deed, except

upon such proof, especially where, as in this case, the defendants in the libel suit were heard at the trial before the jury; then on a motion for a new trial; then in the court below, and finally in the Supreme Court of the United States.

Every material allegation of the bill is denied by the answers and contradicted by appellee's proof. The affidavits in support of the motion to dissolve the injunction, while not strictly evidence, do show that very early in this case the appellants were given the names of those who knew, yet no effort to call any of them was made. Appellee also gave evidence of facts showing his good faith in the matter, and the absence of any relations between him and the insurance companies and negativing any idea of any ulterior purposes on his part, and he is corroborated by the uncontradicted testimony of Hudson (Rec., p. 103) and the testimony of Linscomb (Rec., p. 104).

Every case on the subject requires diligence of inquiry by judgment debtors, and, wanting that, refuses to interfere. Besides, in this case, there is not even a hint that appellee in any way interfered with or hindered appellants in preparing their case; on the contrary, he offered, as the record shows, to be further cross-examined as to his good faith when the court restricted the examination of his own motion. No inquiry was ever made of the judge, who of all men was the most likely to know whether there had been any lack of good faith in the Maryland prosecutions. It does not excuse appellants for them to say they never thought of making inquiry of so natural a source of information, because they are held to the same diligence that a man of ordinary intelligence would exercise, besides they only aver, but do not prove, that they ever considered him as a witness, although the record shows his hostility to appellee. It by no means follows that if the testimony of the judge had been before the jury the result would have been different, for, if the plea had been justification, there would inevitably have been an inquiry into the true history of

that fire, and this would have forced appellants to call Shaw, who, together with them, knows the real fact as to its origin, and under the probe of cross-examination he might well have broken down or been forced to shelter himself under his constitutional privilege; besides, as two juries of this District have refused to believe appellants, they would have probably been less likely to do so when they were carrying the great burden of such a defense. Indeed, it may well have been that a much heavier verdict might have been rendered. There is very strong internal evidence that Talbott's version of the conversation is correct, for if he said what the judge says he did, it is inconceivable that the judge would have failed to take vigorous and prompt action against him. In addition to all this, appellee would have been able to go fully into what he knew.

It is, therefore, submitted on this branch of the case that the appellants, if entitled to be heard at all, have wholly failed to establish their case on the facts. Indeed, in view of what has been said of the appellants' intentionally untrue testimony in the libel case, to them might well be applied the doctrine of the Santissima Trinidad case, 7 Wheaton, 283.

The only comment necessary in respect of the attempted bribery of Lipscomb is that, according to Pickford's own testimony, it failed because, after waiting six months, Lipscomb could not produce any of the evidence of fraud which Pickford tried unsuccessfully to buy.

Hudson's testimony concerning Walter's unsuccessful effort to bribe him (Rec., p. 138) stands uncontradicted and throws a flood of light on the belated attempt of the appellants to reopen the case. The inconsistent and self-contradictory testimony of Kilgour proves absolutely nothing as against appellant, and it is apparent no jury would have been impressed by it.

THIRD.

As matter of law can or ought the court to interfere with the enforcement of this judgment?

On this question we are relieved from all doubt by the clear and explicit utterances of this court. The only case cited by appellants below from the Supreme Court of the United States on the question was

Marine Insurance Co. *vs.* Hodgson, 7 Cranch., 332.

There are two complete answers to this case.

A. On the facts, our contention was sustained, and relief refused.

B. The dictum of Marshall, C. J., contains as a prerequisite what is wanting here, *diligence* and interference by judgment creditor.

The following is the very strongest utterance of the Supreme Court in favor of the appellants' contention, and it will at once appear that the record here falls far short of meeting the requirements of the opinion. Says the court:

> "Any fact which *clearly proves* it to be against conscience to execute a judgment and of which the injured party *could* not have availed himself in a court of law, or of which he might have availed himself at law *but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents*, will justify an application to a court of chancery." (The italics are ours.)

The case of Kibbe *vs.* Benson, 17 Wallace, 624, the only other Supreme Court case cited by the trial court admirably illustrates the state of facts under which a judgment will be interfered with, and is totally different from this case. But the case of Throckmorton *vs.* United States, 98 U. S., 61, settles for us in unmistakable terms the true doctrine. The court says:

> "There are no maxims of the law more firmly established or of more value in the administration of justice than the two which are designed to prevent repeated litigation between the same parties in regard to the same subject of controversy, namely, *'interest reipublicæ, ut sit finis litium'* and *'nemo debit bis vexari pro una et eadam causa'*" (page 65).

The court then proceeds to state the grounds upon which it will interfere, as follows:

> "But there is an admitted exception to this general rule in cases where by reason of something done by the successful party to a suit there was in fact no adversary trial or decision of the issue in the case.
>
> "Where the unsuccessful party has been prevented from exhibiting fully his case, *by fraud or deception practiced on him by his opponent*, as by keeping him away from court; a false promise of a compromise; or where the defendant never had any knowledge of the suit, *being kept in ignorance by the acts of the plaintiff*; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat or where the attorney regularly employed corruptly sells out his client's interest to the other side, these and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree and open the case for a new and a fair hearing" (pp. 65 and 66). (The italics are ours.)

But if the decree of the trial court can be sustained, all that will hereafter be necessary will be to provide a resourceful counsel, a complaisant and fluent conversationalist, and a sufficient number of "casual conversations" to indefinitely defer the payment of any judgment; indeed, the "casual conversationalist" will become as valuable as was the ancient "casual ejector." Such, we submit, cannot be the law.

If in the presence of such controlling authority any further citation of authority were needed, it is available in the

greatest abundance, for the current of authority is all one way. There are, however, three such striking cases corroborating most fully and citing the Throckmorton case that it is deemed proper to cite and briefly quote from them.

In Maryland Steel Co. *vs.* Marney, 91 Maryland, 360, the court says:

> "It therefore requires a well-established case to authorize a court to grant a new trial on a motion seasonably made before judgment on the allegation of a litigant that the testimony on the opposite side was false, and as there is nothing connected with the administration of justice of more importance than having some definite and fixed rules which must bring litigation to an end, courts have always been reluctant to disturb judgments rendered in the due course of their proceedings and have for the most part held that the mere fact that a judgment was obtained through perjury of a witness is not sufficient to justify them in setting it aside."

The Throckmorton case, 98 U. S., and the Pico case, 91 Cal., are cited and extensively quoted.

In this case it was conceded that a witness had been bribed to testify falsely, and that his testimony procured the verdict.

In Pico *vs.* Cohn, 91 California, the court says:

> "The wrong in such case is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. Endless litigation in which nothing would ever be determined would be worse than occasional miscarriages of justice, and so the rule is that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony, for if this could be done *once* it could be done *again and again ad infinitum.*" (The italics are ours.)

In this case also the witness had been bribed and committed perjury and his false testimony was believed by the judge, and title to property worth $200,000 was diverted from the true owner.

In Mayor, etc., *vs.* Brady, 115 N. Y., 599, it is said:

> "The conditions under which such claims can be supported require at least the proof of extraordinary circumstances, the absence of laches, and the establishment of a case showing no reasonable doubt as to the conclusiveness of the discovered proof, the justice of the claim and the merits of the controversy."

Briefly to summarize, it is respectfully submitted:

1. That under the spirit of the prohibition of article 7 of the Amendments to the Constitution the relief sought is forbidden.

2. That the proof fails in essential particulars to meet the standard required to justify interference with either a deed or judgment.

3. That it does not even inferentially appear that if justification had been pleaded and the alleged conversation with the judge had been testified to by him, the result would have been different, for on the other hand Talbott and the representatives of the insurance companies would have testified, and the true history of that most mysterious fire would have been developed.

4. That as matter of law and under settled legal principles the court below ought not to have enjoined the collection of a judgment approved by three courts.

The true underlying principles controlling such cases as this are luminously and forcibly stated in the opinion of the court below (Rec., 157 to 164).

Upon the whole record it is respectfully submitted that the decree of the court below was right and should be affirmed.

JOHN RIDOUT,
Attorney for Appellee.

27

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 512.

THOMAS H. PICKFORD AND JOHN H. WALTER, APPELLANTS,

vs.

HENRY M. TALBOTT.

Memorandum in Behalf of Appellants in Opposition to Appellee's Motion to Dismiss Appeal or in the Alternative to Transfer the Cause to the Summary Docket.

SAMUEL MADDOX,
HENRY E. DAVIS,
H. PRESCOTT GATLEY,
Attorneys for Appellants.

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Memorandum in Behalf of Appellants in Opposition to Appellee's Motion to Dismiss Appeal or in the Alternative to Transfer the Cause to the Summary Docket.

This is a proceeding in equity to enjoin the collection of a judgment obtained by appellee in the Supreme Court of the District of Columbia, which judgment was on appeal affirmed by the Court of Appeals of the District of Columbia and by this court.

The ground upon which relief is sought is that the judgment was obtained by means of gross fraud perpetrated by appellee upon appellants and the courts of this District.

The chief witness for the plaintiffs in the bill is the Honorable James B. Henderson, until recently one of the circuit judges for Montgomery county, in the State of Maryland. His testimony relates to certain statements made to him by appellee, and this evidence was not known to appellants until after the affirmance by this court of the judgment and immediately prior to the issuance of the mandate of this court in the cause.

The judgment, collection of which is sought to be enjoined, was obtained in an action of libel based upon an article published concerning the alleged burning, in the year 1901, of a certain dwelling located in Montgomery county, Maryland. This incident has been an almost constant source of litigation in this District since that time.

The record in this case is quite voluminous (comprising 167 printed pages), containing the testimony of numerous witnesses relating to the subject-matter of the litigation and bearing materially upon the question of the fraud committed by appellee.

The case presents several novel and important principles of law and involves the application of these principles to a very complicated state of facts.

The trial court found as a fact that appellee was guilty of the fraud charged against him, and permanently enjoined him from collecting the judgment on the ground that it would be inequitable and against conscience to permit him so to do (R., p. 154).

The Court of Appeals does not determine the question of fraud as a matter of fact, but bases its opinion chiefly upon the ground that appellants did not exercise due diligence in ascertaining what Judge Henderson knew of the matter. The record discloses that the utmost diligence on the part of appellants would not have warranted them in going to this judge on the theory that possibly appellee, who was at the time of the recovery of the judgment State's attorney for Montgomery county, Maryland, had made to a judge of his court statements showing that he was guilty of fraud and of using his office in an improper manner, as found by the trial court (R., p. 162) (R., p. 154).

If this case is put upon the "Summary Docket," as requested by appellee, but one half hour would be allowed for the presentation of appellants' case. It would be impossible to fairly state the facts of this case in their proper order within that space of time.

The case is one of importance, not only to the parties to it, but to the public, and to the due and proper administration of justice in the courts of

this District. The time for presenting it to this court should not be abridged.

Wherefore, it is respectfully submitted, appellee's motion should be overruled.

SAMUEL MADDOX,
HENRY E. DAVIS,
H. PRESCOTT GATLEY,
Attorneys for Appellants.

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MOTION.

Now comes the appellee, by his attorney, and under the provisions of rule 6, section 5, as amended, moves the court to dismiss this appeal on the ground that—

It is manifest that the appeal was taken for delay only.

And said appellee in the alternative moves the court to transfer this cause for hearing to the "Summary Docket" provided for by said rule as amended, on the ground that the case is of such a character as not to justify extended argument.

JOHN RIDOUT,
Attorney for Appellee.

Statement in Support of Motion.

The record and the opposing briefs herein show that appellant Pickford is a man of large means and engaged in extensive business ventures.

It is matter of common knowledge that to such a man the use of money is of far greater value than 6 per cent per annum.

If by this appeal payment of the judgment can be delayed for a long time he will actually save a very large sum.

The judgment was rendered in March, 1906, for $8,500, and bears interest at the rate of 6 per cent per annum.

By the various dilatory proceedings exhibited in the record said Pickford has saved, it is submitted, at least 4 per cent per annum already, or 20 per cent thereof, and of course he naturally desires to retain the use of the fund as long as possible, and can well afford to pay the fees of his eminent counsel to do so.

It clearly appears from the luminous opinion of the Court of Appeals (Record, pp. 157 to 164) that this is not by any means a case wherein extended argument is required.

On the above statement and appellee's briefs already in the case on previous motions having for their object the obtention of a speedy hearing, appellee respectfully submits said motions.

JOHN RIDOUT,
Attorney for Appellee.

Messrs. SAMUEL MADDOX,
H. PRESCOTT GATLEY,
HENRY E. DAVIS,
Attorneys for Appellants:

Please take notice that the above motion and statement will be submitted to the court on Monday, November 27, 1911, at the opening of the court on that day or as soon as counsel can be heard on that day.

JOHN RIDOUT,
Attorney for Appellee.

PICKFORD *v.* TALBOTT.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 512. Argued April 29, 1912.—Decided June 7, 1912.

In order to warrant a court of equity in restraining the enforcement of a judgment at law, the defeated party must show that it is manifestly unconscionable for the judgment creditor to enforce it; it is not sufficient for him merely to show that because of newly discovered facts or evidence he would have a better prospect of success on a retrial.

It is incumbent on one seeking to have the enforcement of a judgment against him enjoined by a court of equity on the ground of newly discovered evidence to show that his failure to discover the evidence relied upon as defense was not attributable to his own want of diligence.

For the purpose of equity restraining the enforcement of a judgment at law, a defense is not deemed to be newly discovered or to have been lost by accident or mistake, if it was, or ought to have been, within the knowledge of the party when he made his defense to the action at law.

A defendant in a libel suit who deliberately abstained from defending by justification of the charges, cannot, after verdict and judgment against him, come into equity and seek to restrain the enforcement of the judgment on the ground of newly discovered evidence tending to prove the truth of the charges.

Quære whether a defendant in a libel suit who made a public charge of malfeasance in office without having evidence of truth sufficient to warrant prudent counsel in making an issue of it, is not barred from relief in equity under the doctrine of clean hands.

36 App. D. C. 289, affirmed.

THE facts, which involve an attempt to restrain in an action in equity the enforcement of a judgment obtained on the law side of the court against complainant in an action for libel, are stated in the opinion.

Mr. Henry E. Davis, with whom *Mr. Samuel Maddox* and *Mr. H. Prescott Gatley* were on the brief, for appellants.

Mr. John Ridout for appellee.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an equity action, brought by the appellants against the appellee and others, in the Supreme Court of the District of Columbia, to obtain an injunction restraining the enforcement of a judgment theretofore recovered by the appellee against the appellants in an action for libel. That action was on the law side of the Supreme Court of the District, and resulted in a verdict and judgment for $8,500 damages, which on review was affirmed by the Court of Appeals (28 App. D. C. 498) and by this court (211 U. S. 199).

The present action was commenced after the final affirmance of the judgment at law. Upon the filing of the bill of complaint herein, with accompanying exhibits, the court made a temporary restraining order. This was continued until the final hearing, and that hearing resulted in a decree granting a perpetual injunction against the enforcement of the judgment. The defendants in the equity action, other than the present appellee, were joined for reasons not now material. He alone appealed from the final decree to the Court of Appeals of the District, which reversed the decree and ordered the cause to be remanded to the court below, with direction to dismiss the bill of complaint (36 App. D. C. 289). From the decree of reversal Pickford and Walter have appealed to this court, thus presenting for our decision the question whether, upon the pleadings and proofs, they are entitled to an injunction restraining the enforcement of Talbott's judgment against them.

The equitable jurisdiction is invoked upon the ground that after the conclusion of the litigation at law the appellants discovered certain evidence which, if known at the time, might and would have enabled them to make a different defense in the court of law, and which it is alleged would assuredly have led to a different result there; it being insisted that the appellants were not at fault in failing to discover the evidence referred to.

A brief history of the controversy between the parties is essential to an understanding of the questions presented.

In the month of March, 1901, while the appellee, Talbott, was State's attorney for Montgomery County, Maryland, an indictment was returned by the grand jury of that county charging Pickford and Walter, the appellants, and two others named in the indictment, with having unlawfully, wilfully and maliciously set fire to and burned a certain untenanted dwelling house, the property of said Pickford and Walter. A dwelling house owned by them, situate in Montgomery County, had in fact been destroyed by fire in the latter part of the year 1897, and the fire insurance companies, after some demur, had paid to the owners sums aggregating $22,500. It is said to have been the purpose of the indictment to attribute to the defendants named therein an attempt to defraud the insurance companies. Three of those defendants (including Walter, but not Pickford), being arrested in the District of Columbia, where they resided, sued out writs of *habeas corpus* in the District, and were released on the ground that the indictment did not set forth any crime. Pickford surrendered himself in Montgomery County and gave bail to answer the indictment, and his trial was set down for a day in the following November before the Circuit Court. He duly appeared, but Talbott, as State's attorney, asked for a postponement on the ground that he was not ready for trial. The court strongly intimated that there ought to be no postponement, and upon this intimation (and

perhaps partly because of the question that had been raised about the sufficiency of the indictment) Talbott entered a *nolle prosequi* as to Pickford. Later, he did the same with respect to Walter.

Thereafter, and in the month of December, 1901, Pickford and Walter procured to be published in the columns of a newspaper in Washington an article concerning Talbott which was the ground of his action against them for libel. A copy of the article was included in the declaration in that suit and was attached to and made a part of the bill of complaint herein. Through some inadvertence it was omitted in the printing of the record, but upon the argument we were, by consent of counsel, referred for information as to its contents to the record that was here on the former occasion (211 U. S. 199). The article purported to show "the true inwardness of the criminal scheme that culminated in this nefarious indictment," and declared that "we shall state the facts as we have learned them after a thorough investigation." It charged Talbott, as State's attorney, with participation in an alleged conspiracy to force Pickford and Walter, by means of an unfounded indictment, to repay to the insurance companies the moneys that had been paid by them to Pickford and Walter for the fire loss.

The libel suit was commenced in the year 1902. The final affirmance of the judgment therein was on November 30, 1908. The present action was begun in the following month of January.

The bill of complaint avers that at the time of the filing of the declaration in the libel suit the complainants believed it to be true (the ground of that belief is not distinctly averred) that Talbott had caused the indictment to be procured for the purpose of obtaining from the insurance companies certain large sums of money, and had thus used his public office for his personal gain; that they so informed their counsel before the filing of their pleas,

but were advised by counsel that should they attempt to justify the publication of the article by pleading the truth thereof, and fail to make good such plea by evidence to the satisfaction of the court and jury, the attempt at justification would be held to be a repetition and republication of the libel, and would aggravate the damages to be recovered in the action; that they were, on the other hand, advised by their counsel that if they should plead "not guilty" to the declaration they would probably be excluded from endeavoring to prove the truth of the alleged libel; and that the complainants, being unable, after due diligence, to procure and submit to their counsel evidence which in the opinion of counsel might properly and safely be offered on the trial of the action in justification of the alleged libel and in proof of the truth thereof, were compelled to confine, and did confine, their defense to the general issue, and were thereby deprived of the opportunity to offer evidence tending to prove its truth; but that upon the trial they were permitted to introduce, and did introduce (not in justification of the alleged libel nor to prove the truth thereof, but to show absence of malice on their part and thus to mitigate the damages), sundry matters and things which are set forth at great length in the bill, all of which, it is averred, were known to the complainants at and before the composition and publication of the libel.

So far as appears, the matters thus recited furnished the sole basis for their alleged belief that Talbott had prostituted his office in the manner alleged in the newspaper article. Without repeating them here, it is enough to say that if those matters did in fact constitute their whole case against Talbott, their counsel was probably correct in his judgment that a plea of justification, supported by such evidence alone, would be deemed a republication of the libel and a ground for allowing increased damages against them.

The bill of complaint further avers that before pleading

to the declaration the appellants and their counsel diligently inquired of every person believed to have any possible knowledge in the premises, with the view to obtaining and producing testimony tending to support a plea of justification and to prove the truth of the matter alleged as libelous, but without avail.

It also alleges that the like diligent inquiries were continued after the trial of the cause down to the filing of the bill, but wholly without result until the twenty-ninth day of December, 1908, when, in an accidental meeting between one of the counsel for the appellants and Hon. James B. Henderson, one of the judges of the Circuit Court for Montgomery County, who held that office at the time of the indictment referred to, Judge Henderson informed counsel of a conversation said to have taken place between him and Talbott while the indictment was pending, in which conversation Talbott stated to the judge in substance that he was keeping the indictment alive in order to assist the insurance companies in an effort to recover from Pickford and Walter the moneys that had been paid to them for the fire loss; and that he, Talbott, or his firm, would get a large fee out of the business.

The bill rests the prayer for relief against the judgment at law solely upon the ground that the evidence of Judge Henderson, taken in connection with the other matters and things that were given in evidence on the trial of the libel suit as mentioned, would have caused the jury to render a verdict in favor of the defendants, Pickford and Walter.

Talbott answered the bill, fully and specifically denying all allegations thereof that attributed improper conduct to him, and expressly denying the alleged conversation between him and Judge Henderson, and denying that he had kept the indictment alive for personal gain, and every other improper inference deducible from the alleged conversation. The answer called upon complainants to make

strict proof of the averments of the bill respecting the conferences between complainants and their counsel and respecting what was done by them about the preparation of their defense in the action at law, and denied that if the truth of the libelous matter had been pleaded and the evidence of Judge Henderson introduced the result of the trial would have been different; averring that if the pleadings had been such as to admit his testimony the door would have been opened for the admission of other evidence unfavorable to the complainants.

After the filing of this answer the complainants, by leave of the court, amended and supplemented their original bill of complaint by the addition of a considerable amount of new matter. Included in it is an averment that the indictment of Pickford and Walter, as above mentioned, was in fact caused by and through a conspiracy between Talbott and others, with the object of extorting money from the complainants, and that everything done by Talbott in reference to the indictment was done in pursuance of that conspiracy. To this, by a further answer, Talbott entered an unequivocal denial.

Upon these pleadings, and upon proofs submitted by the respective parties in support thereof, the cause was brought to final hearing, with the result already mentioned.

The principles upon which the decision of the case must turn are entirely familiar. In order to warrant the interposition of a court of equity to restrain the enforcement of a judgment at law, it is, of course, not sufficient for the defeated party to show that because of some newly discovered evidence pertaining to an issue in the case, or because of some newly discovered fact that might have been put in issue, he would probably have a better prospect of success on a retrial of the action. He must show something to render it manifestly unconscionable for his successful adversary to enforce the judgment.

As Chief Justice Marshall said: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery." *Marine Ins. Co.* v. *Hodgson*, 7 Cranch, 332, 336. Or, as Mr. Justice Curtis expressed it, in *Hendrickson* v. *Hinckley*, 17 How. 443, 445: "A court of equity does not interfere with judgments at law, unless the complainant has an equitable defense, of which he could not avail himself at law, because it did not amount to a legal defense, or had a good defense at law, which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents."

One who seeks relief in equity against a judgment at law on the ground that through accident or mistake alone, unmixed with fraud, he has lost the benefit of a defense that would have been available in the court of law, must show entire freedom from fault or neglect on the part of himself and his agents, and must also make it manifest that the judgment against him is wrong on the merits, that he ought in justice to prevail, and that upon a retrial, with the aid of the newly discovered matter of fact or of evidence, it is reasonably certain that he will prevail. Pom. Eq. Jur. (3d ed.) §§ 1364, 1365, and notes.

The trial court rested its decision adverse to Talbott upon the theory that if it were true that he had misused his office as State's attorney, and, because of spite or for any other selfish or personal reason, had wrongfully procured an unjust indictment against Pickford and Walter,

he ought not, in equity and good conscience, to be permitted to collect damages against them for publishing his misconduct, because he would thereby be taking advantage of his own wrong. The court recognized that this theory was applicable only if the statements made in the libelous article were true; and, accepting Judge Henderson's testimony as conclusive upon that issue, the court held it to be unconscionable for Talbott to enforce his judgment. We find it unnecessary to test the correctness of the theory, because, like the Court of Appeals, we differ with the trial court upon the question of fact. Under the pleadings, the burden was upon the complainants (now appellants) to prove the official misconduct of Talbott, and this they failed to prove.

The Court of Appeals, correctly considering that most of the evidence was wholly irrelevant to the issues, and that substantially the only material evidence in support of the bill was that of Judge Henderson, and reviewing his testimony *in extenso*, came to the conclusion that it not only did not conclusively establish the truth of the matters alleged in the libelous article, but did not render it clear beyond reasonable doubt that it would produce a verdict favorable to the complainants if a new trial of the libel suit should be had. Attention was called to the fact that Judge Henderson testified to a conversation had with Talbott about nine years before, of which he had no memorandum to refresh his memory; that his examination showed his memory to be not entirely reliable; that Talbott expressly denied making the incriminatory statements attributed to him; that it was improbable that a lawyer of his standing, holding the important office of State's attorney, would, without apparent motive, deliberately make an admission to any one, much less to the judge of his circuit, that he was using the powers and opportunities of his office for private gain; and that it was improbable that such an admission, if made under such circumstances,

would go unrebuked at the time. With this view we agree.

All question of fraud in the procurement of the judgment at law is thus eliminated. Indeed, counsel for appellants disavow any reliance upon fraud as a ground of relief. To quote from the brief: "The bill makes no averment whatever as to any fraud on the part of the appellee, plaintiff in the law suit, in procuring the judgment in question; the ground on which relief is prayed is accident, as distinguished from fraud."

Next, we agree with the Court of Appeals that, assuming the newly discovered evidence elicited from Judge Henderson would otherwise be sufficient ground for restraining the enforcement of the judgment, it was incumbent upon the appellants under the pleadings in the present action to prove that their failure to discover evidence of the truth of the libel and plead the same by way of defense in the action at law was not attributable to their own want of diligence. The bill alleges that they made diligent but unsuccessful efforts to discover such evidence, both before and after the filing of their plea. The answer calls for strict proof of this. But the averment is left entirely unsupported by the proofs in the case. Neither Pickford nor Walter nor their counsel in the libel suit gave any evidence tending to show any effort, diligent or otherwise, to discover evidence of the truth of the libel.

We do not hold them negligent merely because of not having sooner discovered that Judge Henderson was available as a witness. He himself testified to the effect that, because of the character of the communication, he was careful not to reveal what was said by Mr. Talbott to him until after the conclusion of the libel suit. But, assuming that what was charged against Mr. Talbott in the newspaper article was true, it is not to be assumed that diligent efforts would have discovered no other evidence of its truth. All of Talbott's dealings with the insurance

companies and with the other persons concerned in his alleged misconduct were within the range of investigation, had diligence been exercised.

Again, one of the peculiar features presented by this case is the following: Appellants, coming into equity for relief on the basis of Judge Henderson's evidence, rely upon it not as newly discovered evidence alone, but as evidence of a newly discovered fact. Merely as evidence it would not have been admissible on the former trial, justification not having been pleaded. It is upon the fact alleged to have been disclosed by Judge Henderson—the fact being Mr. Talbott's alleged misconduct, and not merely his alleged admission of it—that appellants are relying as a newly discovered defense to the action for libel. Now, the settled rule in equity is that a defense is not to be deemed "newly discovered," or as lost by "accident or mistake," if it was or ought to have been within the knowledge of the party when he was called upon for his defense in the action at law. As Lord Hardwicke said, "As to relieving against verdicts, for being contrary to equity, those cases are, where the plaintiff knew the fact of his own knowledge to be otherwise than what the jury find by their verdict, *and the defendant was ignorant of it at the trial.*" *Williams* v. *Lee*, 3 Atk. 223, 224. Chancellor Kent said: "The general rule is, that this court will not relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question, pending the suit, or it could not have been received as a defense." *Lansing* v. *Eddy*, 1 Johns. Ch. 49, 51. See also *Taylor* v. *Nashville & C. Railroad Co.*, 86 Tennessee, 228, and cases cited.

But how can the appellants be heard to say that when making their defense at law they were ignorant of the truth of the matters charged against Talbott in the newspaper article, when they themselves were the authors of those charges? Not only do the verdict and judgment in

the libel suit legally establish their responsibility for the published accusation, but such responsibility is tacitly admitted in the bill of complaint herein, and there is nothing to throw doubt upon it.

Upon the whole case, therefore, it cannot be said that appellants omitted to plead justification in the libel suit because of any "accident" or "mistake" within the meaning of the equitable rule. That defense was considered by them and their counsel and deliberately and advisedly rejected because (a) it could not be sustained, and (b) a failure to sustain it would probably embarrass them in their defense under the general issue, or rather, would render it probable that in the anticipated event of the plaintiff prevailing over them on the general issue, increased damages would be awarded against them because of the reiteration of the libel in a plea of justification. And if when called upon to make defense in the libel suit they had no sufficient evidence at hand to maintain the truth of the published matter, this must on the present record be attributed to one or the other of two causes. One is, that the published matter was in fact untrue; the other is, that they did not use proper diligence to discover evidence of its truth. Either explanation leaves them without claim to relief in this action.

The question whether appellants, because of having originally made a public accusation of malfeasance in office against the appellee without having evidence of the truth of the accusation sufficient even to warrant prudent counsel in making an issue of it in a libel suit, are barred from relief in equity under the doctrine of "clean hands," it is unnecessary to consider.

It seems to us that the case of the appellants is without merit, and the decree under review will be

Affirmed.